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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~709~~ 38

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

MARY L. DONNELLY HENAGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1960
CERTIORARI GRANTED MAY 2, 1960

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IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

v.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

Record Appendix to Brief for Defendant, Appellant

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS.

Civil Action No. 57-969-W.

MARY L. DONNELLY HENAGAN [as amended]

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Relevant Docket Entries.

1957		
Oct.	3	Complaint filed.
	25	Defendant's answer filed.
1958		
March	19	Wyzanski, J. Hearing on pltf's motion for production of records or documents. Motion allowed. on paragraphs 1 and 2. 2 weeks to produce
May	12	Withdrawal of appearance of Dever and Proctor, Edward O. Proctor, Jr., Esq., filed.
	12	Appearance of James W. Kelleher, Esq., for pltf., filed.
Dec.	12	Appearance of James R. DeGiacomo, Esq., for pltf., filed.
	15	Notice of taking deposition of John H. Smith, filed.
1959		
Jan.	5	Wyzanski, J. Jury impanelled; trial begins; evidence;

Jan 6 Deposition of John Henry Smith, filed.

6 Wyzanski, J. Jury trial continues. evidence, Court ordered papers amended to show plaintiff's marriage name. Deposition of Mr. Smith read by Atty. DiGiacomo. adjourned until Jan. 7, 1959

7 Wyzanski, J. Plaintiff's motion to amend complaint—allowed—Deft's motion for directed verdict—denied—arguments—charge —Deft's request for instructions filed. Verdict for plaintiff—$30,000.00

8 Wyzanski, J. "After trial and in accordance with the verdict of the jury, it is ORDERED plaintiff, Mary L. Donnelly Henagan to recover from the defendant, The New York, New Haven & Hartford Railroad Company the sum of $30,000.00 and costs taxed at $ " Judgment entered.

12 Motion for judgment notwithstanding verdict and motion for a new trial, filed.

13 Wyzanski, J. Hearing on motion for judgment notwithstanding verdict and motion for a new trial. Motion denied.

13 Wyzanski, J. On defendant's motion for directed verdict filed in open court on January 7, 1959 again denied.

Feb. 11 Notice of Appeal filed by the defendant, The N.Y. N.H. & H. RR Co.,

Mar. 26 Stenographic record on January 5, 1959, filed. (volume I)

26 Stenographic record on January 6, 1959, filed. (Volume II)

26 Stenographic record on January 7, 1959, filed. (Volume III)

27 Under Supplemental Certificate, Deposition of John Henry Smith, Stenographic Transcript

—Pltff's Exhibit 4 and Stenographic Record of Trial Vols. I, II delivered to the U.S. Court of Appeals

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Complaint.

[Filed Oct. 3, 1957.]

1. The ground for jurisdiction in this action is that the action arises under the Act of April 22, 1908, Ch. 149, § 1; 35 Stat. 65; USCA Title 45, § 51, (otherwise known as the Federal Employers' Liability Act) as hereinafter more fully appears.

2. Plaintiff is a citizen of the Commonwealth of Massachusetts and resides in the City of Boston, Suffolk County, in said Commonwealth.

3. On or about October 11, 1954, plaintiff was regularly employed by the defendant as a waitress in the service car on a train running between New York and Boston, her duties being to serve passengers with food and drink.

4. Defendant is now and was at all times hereinafter referred to, a railroad corporation, organized and existing under the laws of the Commonwealth of Massachusetts, and maintains a regular and permanent place of business in the City of Boston, Suffolk County, in said Commonwealth. Defendant is now and was at all times hereinafter referred to, a common carrier of freight and passengers, engaged in inter-state commerce.

5. On or about October 11, 1954, plaintiff was performing her regular duties on a train proceeding from Boston to New York. On said day at or near Providence, Rhode Island, defendant, its agents or servants, negligently operated said train causing it to come to a sudden and unexpected stop.

6. By reason of the negligence of defendant, its agents or servants, in thus negligently causing the train to come

to a sudden and unexpected stop, plaintiff was thrown with great force and violence against a door, wall, or partition within the train and caused to fall to the floor thereby severely injuring her person.

7. Prior to this injury, plaintiff was a well, able-bodied woman capable of earning and actually earning one hundred and ten dollars compensation per week and additional gratuities. By this injury she has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred great expense for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of one hundred thousand dollars and costs.

The plaintiff demands a trial by jury.

By her attorneys,
DEVER AND PROCTOR
EDWARD O. PROCTOR, JR.

Motion to Amend Complaint.

[Filed January 7, 1959.]

Now comes the plaintiff in the above entitled case and moves to amend the Complaint:

1. By striking from the caption of the case the words "Mary L. Donnelly" and substituting in place thereof, the words "Mary L. Donnelly Henagan."

2. By striking in the last sentence thereof, the words "one hundred thousand dollars", and substituting therefor, the words, "two hundred fifty thousand dollars."

By her attorney,
JAMES W KELLEHER

WYZANSKI, J.
Jan. 7, 1959.

Defendant's Answer.

[Filed October 29, 1957.]

The defendant admits the allegations contained in paragraphs numbered 1, 2, 3, and 4 of the complaint.

The defendant denies the allegations contained in paragraphs numbered 5, 6, and 7 of the complaint and any other allegations not expressly admitted as aforesaid.

By its Attorney,

NOEL W. DEERING

Trial.

[17] FRED A. CRAFT, *Sworn*

Direct Examination by Mr. Kelleher

Q. What is your name, sir? A. Fred A. Craft, C-r-a-f-t.

Q. And where do you live, Mr. Craft? A. 23 Chandler Street, Worcester, Massachusetts.

Q. What is your occupation? A. Railroad engineer.

[18] Q. Are you employed by the New Haven Railroad? A. Yes, sir.

Q. Were you so employed on October 11, 1954? A. Yes, sir.

Q. At that time were you the engineer on the train proceeding from Boston to Providence? A. That is correct.

Q. At what time did that train leave Boston, as well as you can recollect, Mr. Craft? A. I believe it was 7 o'clock.

Q. In the morning or the evening? A. In the morning. A.M.

Q. Did it leave on time? A. Yes, sir.

Q. About what time did it arrive at Providence? A. 7.57.

Q. Was it on time? A. Yes, sir.

Q. Exactly what time would you say? A. Well, if you mean in the station, we didn't get in the station on account of the accident.

Q. I see. A. We were on time going through the last station.

Q. You as a railroad engineer, Mr. Craft, are rather careful about that? You have to be accurate? A. I beg your pardon, sir?

[19] Q. You are careful about time? A. We have to be, yes, sir.

Q. You have timetables to meet? A. Yes, sir.

Q. And, as I understand it, you have rather accurate timepieces, do you not? A. That is correct.

Q. What timepiece do you have? A. You mean what kind of a watch I have?

Q. Yes. Do you have it with you? A. Yes, sir. Hamilton 21 jewel.

Q. May I see it? A. Yes, sir, you can [handing].

Q. That is an old watch, isn't it, an old time? A. No, sir, it isn't too old.

Q. It isn't? A. No.

Q. A very accurate watch? A. Well, it doesn't vary too much.

Q. Do you have it regulated frequently? A. No, not unless it needs it.

Q. How accurate is it? A. Well, it might vary three seconds in two weeks.

. . . . . .

[21] Q. Let me show you this, Mr. Craft. You have come into this station for many years, haven't you? A. Yes, sir.

Q. Perhaps this plan indicates something to you [handing]. I should say it doesn't to me. A. Well, that is coming into the station.

The Court. That may be marked for identification, as Exhibit 1 for identification, unless you want to introduce it and then it may become an exhibit.

Mr. Kelleher. I think I will introduce it.

Mr. Deering. I do not object.

The Court. All right. Exhibit 1 is a blueprint of the station in Providence?

Mr. Kelleher. Yes.

[Blueprint of Providence Station marked Plaintiff's Exhibit 1.]

Q. Perhaps you can come over in front of the jury, Mr. Craft, and speak directly to them. [Witness advances to jury box.] [22] Stand there so the jury may hear you. First, sir, what are the directions on the plan? A. This here would be west.

Q. Is this an arrow that shows directions? A. I don't eve so.

Q. Does that arrow show north? A. I wouldn't say that.

Q. Will you go ahead and tell us where this track is you came in on that day? A. These tracks here come from Boston.

Q. On the right side of the plan? A. Yes.

Q. You came in on what track? A. Track 1, right here.

Q. So you came in here? A. Yes. There is Track 1 there.

The Court. I didn't quite hear that.

The Witness. That is Track 1.

Mr. Kelleher. He is pointing to it.

Q. It came in and went along some platform, did it? A. There is the platform.

Q. Show us where the platform is. A. I have to follow this along. There is a platform there.

Q. Will you show it to the jury? [Witness points to platform for jury.]

[23] Mr. Kelleher. Can you see this, Mr. Deering?

Mr. Deering. I can see it very well, thank you.

Q. You came from this direction? A. Yes.

Q. You came in this way? A. Yes.

Q. There is your track, and on your right as you came in was a platform; right? A. Yes.

Q. Is that correct? A. That is correct.

Q. And over that platform was there some part of a roof? A. A canopy like.

Q. It doesn't appear but it began some way back? A. I couldn't say for sure but it doesn't go the full length.

Q. This is not, of course, the only track in the station? A. Oh, no.

Q. There is another track? A. There is one next to that one.

Q. It came in about like that? A. That's right.

Q. And between those tracks there is a fence; is that right? A. Correct.

Q. May I make a little line through that, like that. Is that right? [24] A. That is correct.

Mr. Kelleher. Could I see those pictures, Mr. Deering, please?

The Court. Those may be offered collectively as Exhibit 2 and divided into a, b, c, d.

[Five photographs marked Plaintiff's Exhibits 2a through 2f, respectively.]

Mr. Kelleher. I'm going to reserve one, which is a picture of the locomotive which you can offer a little later.

The Court. I'm admitting as Exhibit 3 a picture of the locomotive but you don't have to use it now.

Mr. Kelleher. I think it ought to come from the other side.

The Court. All right. How many are there of the station, Mr. Duwan?

The Clerk. Six.

The Court. All right, that is a-f, that is, Exhibit 2a to f.

Q. I think I will first show these to the jury. Have you seen these before, Mr. Craft? A. I think I have.

Q. Will you look at them again, to make sure they relate to the station in Providence and the track where you came in? A. [after examining]. They do, yes.

Mr. Kelleher. Now may I show this to the jury, your [25] Honor?

The Court. Yes.

[Photograph handed to jury, and witness returns to stand.]

Q. Let me show you Exhibit 2f. Now I will ask you, Mr. Craft, whether that isn't a view of the station platform looking towards Boston? A. Yes, looking this way to the east would be towards Boston.

Q. That is the way it looked that day; correct? A. Yes, that is substantially so.

Q. And the track on your right is the track on which you came that day; is that correct? A. Yes, sir.

Mr. Kelleher. I will pass that to the jury.

Q. Exhibit 2e I show you, and that, as I understand it, is a view of the station looking in exactly the opposite direction, looking west, that's the way you came in? A. That's right.

Q. And the track on your left is the track you came in on? A. Yes.

Q. And the same is true, is it not, it may be from a slightly different standpoint, of the same track in Exhibit 2d, that is, the view as you came in that day, a view towards the west? A. That is correct.

Q. I am not quite clear about Exhibit 2c, Mr. Craft.

Will [26] you tell us about that? A. That would be more on the west end of the station.

Q. Facing which way? A. That would be facing toward the west.

Q. Facing toward New York? A. That is correct.

Q. And on which track were you coming in? A. This one [pointing].

Q. The one on your left? A. That is right.

Q. I now show you Exhibit 2b also. A. It is partly the east end of the station.

Q. Will you say where it is facing? A. Facing west or south.

Q. Facing toward the New York direction? A. New York, that is right.

Q. And which side were you coming in on? A. The one close to the fence.

Q. Now I show you 2a. A. That is at the east end of the station.

Q. Facing— A. Facing what you are looking at.

Q. But facing what? Is the track on the right-hand side of Exhibit 2a the track on which you were coming in? A. That is right.

[27] Mr. Kelleher. I will hand these to the jury for their examination [handing].

Q. Let me call your attention, Mr. Craft, to Exhibit 2c, which you have already explained to the jury. That photograph is facing towards New York, isn't it? A. Yes, sir.

Q. And it is the track on the left on which you came in that day? A. That's right. The one next to the fence.

Q. I call your attention to the fence [pointing]. A. That's right.

Q. Can you tell us about how high that fence is? A. Well, I imagine it's about that high [illustrating]. Now that is somewhere within 6 inches of that height.

Q. You mean from the floor? A. Well, that is right. About that high.

Q. It's a wooden fence, apparently, isn't it? A. Well, it's wooden bound by iron at different places.

Q. How far would you say it was to the nearer rail? A. To the nearer rail?

Q. Yes. Your best idea. A. Oh, I would think it was 2, 2-1/4 feet, something like that.

Q. On the other side, the other one nearest the platform, the platform is raised a little above it, isn't it? A. Which rail are you talking about?

[28] Q. I'm talking about the right-hand rail. A. Yes, that's right.

Q. There is the platform [pointing]. A. That is right.

Q. How high is it raised? A. Oh, I imagine that is raised 6 or 7 inches.

Q. And how far is it from the right hand? A. About the same clearance as the fence.

Q. As the other rail? A. That's right.

Q. 2 feet, 2-1/4 feet? A. I would say the clearance to the car, $\frac{2}{3}$ feet.

Q. How far would you say it was from here to the platform to the further rail, not the nearer one but the further one? A. Oh, the farther rail would be about 7 foot 3 or 4 inches.

Q. I see. The distance between the rails? A. Now wait a minute, I want to correct that. I want to correct that to 6 foot about 9 inches.

Q. 6, 9? A. About that. Not exactly because I didn't measure it.

Q. Well, just so one thing is clear, the distance between the rails is 4 feet 8-1/2 inches? A. Yes.

Q. That is the standard gauge? A. Yes.

[29] Q. So that you are adding a couple of feet to that? A. That's right.

Q. So if one were to step off the platform and go across the first rail to the farther rail that person would have to travel about 7 feet? A. To the farther rail. Well, it isn't quite 7.

Q. A little less? A. A little less.

Q. 6-1/2 feet; is that correct? A. Well, I wouldn't say. I wouldn't know. I never measured it. Things could shift an inch or two one way or the other, and how they put them in I did not measure.

Q. Well, we're not talking about any shift of the fence at the moment. We are talking between the platform and the rails. Give us the distance. A. I wouldn't swear to it because I don't know. I haven't measured it.

Q. Well, I'm merely asking you for an approximation. A. Well, I can give you that.

. . . . . .

[30] Q. Mr. Craft, it is now more than four years since that morning of October 10, 1954, when you came into that station, is it not? A. Correct. That is right.

Q. Do you say now that you have a clear recollection of what happened that morning or not? A. I have.

Q. You do? A. I have, sir.

Q. The fact is—well, let me ask you this. At what speed did you come in that morning? A. Between 13 and 15 miles an hour.

Q. I see. And so that we may understand what that speed means, a speed of 15 miles an hour is about 22 feet a second, is it not? A. I wouldn't say for sure. I don't know. I never figured it down that fine.

Q. Well, let us see if we can be precise about it. It comes to 22 feet per second; is that right? A. That's right.

Q. [multiplying] We have 1320 feet per minute, is that correct? A. According to them figures it is.

Q. Is there anything wrong with the figures? There may be. [31] A. Not that I know of.

Q. There may be something? A. No, I don't think so.

Q. And there are 60 minutes in an hour? A. Yes.

Q. So we multiply by 60 again, do we? A. That is right.

Q. [multiplying] So we have 79,200 feet per hour if you're going 22 feet a second? A. That's right.

Q. Is that right? A. Yes.

Q. And then if we divide that number of feet into a mile, that is five thousand— A. Five thousand two hundred and eighty.

Q. Five thousand two hundred and eighty, as I remember it.

If we have done all this work correctly that ought to give us our speed in miles; is that right? [Multiplies on board.]

It appears to come out even, doesn't it, the division? [Witness computes.] Doesn't it? A. Well, I think it does.

Q. I mean, are you satisfied with these figures? A. I'm satisfied with the figures if—

Q. So it is fair to say you were coming in that day at about 22 feet per second? [32] A. Well, I was going 15 miles an hour but I won't swear I was going 22 feet a second.

Q. Well, the mathematics make it appear that you did. A. Yes, the figures do.

Q. And if these blocks here on the floor are 18 inches each side, which I believe they are—do you want to look at this one down here [pointing]? If we counted out 14 of these that would give us 21 feet and an inch and a half, a foot and a half square? A. That's correct.

Q. So, if I count out fourteen of those,—1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 [walking],—it appears that you were coming in that day at a speed which every second

would carry the front end of the witness stand right over to here; that's about right, isn't it? A. Pretty near it. Pretty near.

Q. I'm just trying to have you estimate your speed as you were coming in. How was the visibility that day? A. Good.

Q. The weather was clear? A. Right. It wasn't clear but the visibility was good.

Q. Nothing to obstruct your view at all? A. Well, the trucks on the platform did a little. There's an ice truck there, and some baggage trucks on the platform, on the east end, the end towards Boston. That's why I didn't [33] see the woman until she got on the track.

Q. That will be about here [pointing]? A. Yes. A little further east. A little that way further. That's right. About in there.

Q. So that they blocked your vision, did they? A. Yes.

Q. Do you know who put those there? A. Oh, certainly not. No, I couldn't tell you who put them there. They're there about all the time.

Q. They're there all the time: Are they railroad trucks? A. Well, they could be American Express Railway trucks. I don't know.

Q. You have seen them there quite frequently? A. Yes.

Q. And you say they did block your vision? A. I beg your pardon?

Q. And you say they did block your vision? A. Well, from seeing the woman standing on the platform they did.

Q. Were there other people on the platform besides this Mrs. Martell?

The Court. How can he tell if his vision was blocked?

Q. Did you observe at some later time? Could you see people on the platform? A. Oh, there were hundreds of people on the platform but they [34] were on the other end, on the west end.

Q. You mean, by that, down this way? A. That's right.

Q. But they were waiting for your train? A. Yes, correct.

Q. In this area here, nearer this end of the platform, were there any people there? A. I think there were some people, two or three people, but I—

The Court. Excuse me. When you say you think, you mean you saw them?

The Witness. I saw somebody.

The Court. Don't use "think" because I can't guess whether it is observation or an inference.

The Witness. O.K.

Q. How many cars did you have on your train that day? A. I'm not sure. I think there were seven or nine.

Q. Well, if I suggested that at one time you said eight, would that refresh your recollection in any way? A. No, I don't think it would, because I haven't seen the report, and it was made out four years ago, and I don't remember whether we had seven or nine cars.

The Court. Is there something mysterious about seven or nine as distinguished from eight which Mr. Kelleher's question suggested to you?

[35] The Witness. No, no, it could be eight.

The Court. All right.

The Witness. It's the length of the train. We just have that distance for the train.

The Court. All right.

Q. You do say, however, as you were coming in on the curve there, again I ask you, at some time you were at a point, let's say, 200 feet from that platform, and at some time you passed that point? A. Oh, I must have.

Q. Well, let me ask you about that. When you passed that point could you see the platform clearly and the people

on it, or could you not? A. Are you talking about the people on the west end? I never see the woman at all until she got on the track, if that's what you're referring to.

Q. The woman who was killed you never saw? A. I never saw her until she got on the track, no, sir.

Q. Do you know where she was found finally? A. Yes, underneath the locomotive.

Q. No, at what point on the track? Will you show us on the large plan? A. It's kind of hard to show you on that.

Q. Well, I think you better do it for the jury. A. Yes, sir. [Goes to jury box.]

[36] The Court. You can use a red pencil or something but mark it. Use the red pencil. The name of the woman was Montell, was it?

Mr. Kelleher. Montell.

The Court. Better put the letter "M" to show where she was.

Q. Where her body was found. A. Yes. [Marking Exhibit 2a.]

Q. You were coming in on Track 5? A. One.

Q. One. A. [to jury] You see there is a crossing here, and there is a railroad truck there. I couldn't tell you whether it is a Railway Express truck or not, it was one of these pick-up trucks.

The Court. Did you put the letter "M"?

Mr. Kelleher. He did, your Honor.

The Court. All right.

Q. Why don't you look at these pictures?

The Court. I don't know whether you can use that red pencil on a glossy surface. You don't have to use it if you would rather use a pen or something.

Mr. Kelleher. We can use a pen.

The Witness. Now there is the crossing [pointing]. She was found right in here.

[37] Q. For the record, Mr. Craft—this picture isn't going to help us very much unless we can be more definite. Can you make it more definite? A. It was right about in here, right in here [marking].

Q. There? A. Right in there.

Mr. Kelleher. On Exhibit 2a the witness has marked on the platform—does your Honor care to look at it?

The Court. Oh, no, I don't care to see anything.

Mr. Kelleher. —with a letter "M" as the place—

Q. I assume that is the place opposite where the body of this woman was found? A. I beg your pardon?

Q. That is the place on the platform opposite where the body was found? A. Well, close to that. She was under the first diesel.

Q. Well, she was within the two rails when she was found? A. That is correct.

Q. Now, without further looking at the picture, Mr. Craft, let me ask you this. Assuming that you have marked with that letter "M" the place on the platform where she was standing before she went on to the track— A. Oh, no; no. No, I marked that where the body was found. I didn't see her on the platform.

Q. I know you didn't, but I asked you to assume that she was [38] standing at that point. A. Assume?

Q. You can assume it. That doesn't mean you have to believe it. Just assume it. A. I want to be understood.

Q. Assuming that, the fact is as you came in you couldn't see her? A. I didn't see her until she got on the track.

Q. All right, you didn't see her. Was there something that blocked your vision? A. The trucks and the ice truck was there.

Q. Did they block your vision? A. To see the woman, yes.

Q. They did? A. To see the woman.

Q. As she was standing at that point, the ice trucks were in the way? A. That's right.

Q. They blocked your vision? A. That's right.

Q. The fact is you didn't see her; you have said that a number of times? A. Yes.

Q. You made a statement about this entire occurrence on the next day, did you not? [39] A. On the very day.

Q. Well, I thought this accident happened on October 11. A. It did.

Q. Well, the statement I'm told that you made occurred on October 12th. Am I in error about that? A. No, I made two statements. I gave it when I reached New Haven on October 11th, taken in the office and given a statement, and the next day I went to Providence and made another statement.

Q. But you did make one October 12th? A. I certainly did.

Q. That's the only one I have seen, Mr. Craft, so let's talk about that one. A. O.K.

Q. That statement was taken down by a stenographer; is that correct? A. Yes, sir.

Q. And I have been furnished a copy of it, and I want you to look at it [handing]. You take as much time as you like to examine it. It is three pages long. Why don't you look at it? There are some others there but yours is on the top.

[Witness peruses statement.]

Q. Have you read it entirely, Mr. Craft? A. Yes, sir.

Q. Let me ask you this first. Does that correctly state what [40] you said on October 12? A. I believe it does.

Q. 1954? A. That's right.

Q. And is that statement correct to the best of your knowledge and belief? A. It was then.

Q. Is it now? A. Yes.

Mr. Kelleher. I offer it.

The Court. Without objection, that is received in evidence as Exhibit 4.

. . . . . .

[41] Mr. Kelleher. This is a transcript, typewritten. It is entitled "Statement of F. A. Craft, Engineman, taken in office of Terminal Superintendent D. G. MacLeod, Providence, Tuesday, October 12, 1954, in connection with injury to Mrs. Amelie Montell when struck by train #5, October 11, 1954."

There were present:

Mr. D. G. MacLeod, Terminal Superintendent
Mr. P. S. Corr, Investigator, Public Utility Administration
Mr. J. A. Murtaugh, District Claims Agent, NYNH&H RR
Mr. F. A. Craft, Engineman
Ruth A. Mathewson, Stenographer

Mr. MacLeod is questioning:

"Q Your full name? A Fred A. Craft.

Q You were the engineman on train #5 on Monday, October 11th? A Yes, sir.

Q Will you tell us please what transpired as you were pulling into Providence Station in regard to this lady, Mrs. Montell, who was injured at Providence? A We were coming into Providence Station between 12 and 15 miles per hour. It wasn't quite 15, and we got up into Providence Station on the curve and I saw this woman step out on to [42] the track and go towards the fence. The bell was ringing, of course, going into the station, and all of a sudden she stepped

into the middle of the track and stooped over with her head towards the diesel and I saw I could only do one thing and that was put the brake into emergency. We were going slow and I put the brake in emergency, and I went practically within 10 feet of the diesel length—the head diesel. That's all I can tell you. Well then when we stopped I went back and I saw the woman laying underneath the front diesel within 10 feet of the end. We disconnected the diesels, pulled ahead and they took the woman out. She was laying between the track with her head towards the east end and her feet towards the west. I don't remember whether she was laying on her back or she might have been laying on her side a little.

Q In relation to the station platform between Tracks 3 and 5, when did you first notice this woman? A I didn't notice this woman until she was stepping on to the track. I might have been looking a little beyond her at that time.

[43] Q Where was your diesel when you first noticed her? A I couldn't say exactly; I would have to guess because these things happen so quickly. You just can't figure out stuff like that because you act as quickly as you can, and I might guess and it might not be correct.

Q Have you an approximate idea as to whether or not you were near the east crossover? A No, I couldn't tell exactly because again I would be guessing.

Q Was the woman in the center of the track or more towards the fence on the south side? A When I first saw her she was on the track towards the fence, and then she turned around and I saw it looked as though she either kneeled, or knelt rather, or stooped down with her head towards the diesel, and then I put the brake on. I figured I had better stop as there was no chance of her getting off the track.

Q You didn't actually see this lady walk from the platform to the track? A Oh, no.

Q When you saw this woman in the track she was facing the fence in a southerly direction? [44] A That's right.

Q And then you say she turned directly towards the engine and then either knelt or stooped down? A Yes, with her head towards the diesel.

Q What diesels did you have? A We had the 0748 ahead and the 0706 on the rear.

Q Were you on time arriving at Providence? A Yes, sir, we had just time enough to make the stop and get out. We are due out of here at 54 and we were coming in between 52 and 53.

Q How many cars did you have? A Eight. We had tried the brakes leaving Boston; we made a brake test and they were perfect. I made a running test between Boston and Back Bay; made a stop at Back Bay; made a stop at #128, reduced my speed at Boston Switch with the brake and made the stop at Providence, and the brakes were O.K.

Mr. Murtaugh questioning:

Q Did you know or notice that 164 stood on Track #1 at the time you came into the station, Mr. Craft? A I believe they did, because the fireman came [45] over to the diesel. It looked to me as though it was 164.

Q Was she on the track east or west of the crosswalk? A I can't say for sure.

Q How far ahead of your engine was this woman when you first saw her? A I would say she was 20 or 30 feet. It's a guess.

Q Did you do everything humanly possible to avoid hitting her? A. Oh, yes. It was impossible though.

Q What were the weather conditions? A It had rained out of Boston and it might have been a little cloudy, but the visibility was good.

Q Did she have anything in her hands? A Apparently she had a pocketbook.

Q Did your fireman give you any warning? A Oh, no, this thing happened so quick that I put the brake on so quick he didn't have time to say anything. He was startled, too.

Q You were on a right-hand curve? A That's right.

Q Your view would be better than his? [46] A That's right. He might not have seen her until I put the brake on.

Q Did she wear glasses? A I couldn't tell you that.

Q She didn't fall off the platform? A Oh, no, she was on her feet until she stooped or knelt in front of me.

Q Were there any obstructions on the platform that would obscure your view of this woman on the track? A Not unless you say the box on the post. That's the only thing I could say.

Q Where did you start your bell ringing? A I started it long before I got to the platform.

Q How? A It is a small valve you turn that admits air to a piston and it rings the bell.

Q Did you shut it off after the accident? A After we stopped, yes.

Q Was there anyone else on the engine besides you and the fireman? A. No.

Q Can you think of anything that we haven't covered? [47] A No, unless you want to know how old I am or how long I have been running an engine.

Mr. MacLeod questioning:

Q How long have you been running an engine, Mr. Craft? A Since 1920, off and on.

Q How old are you? A 62 years old.

Q How long have you had your first class papers to run passenger trains? A I think it was 1943 or 1944.

Statement time: 11:50 A.M. to 12:20 P.M. (EST)"

Q. Now, having heard me read your statement, does that refresh your recollection of what took place at this event? A. I don't think so. I think that after I made that statement, I think there was a little change in it.

The Court. I beg your pardon? There was a change in the statement or a change in your memory? I'm not clear.

The Witness. Well, I think there was a little change after I looked the situation over, from the time I gave the statement.

The Court. Well, I don't quite understand what you are saying. Are you saying your recollection after you gave [48] the statement?

The Witness. After I looked the situation over it was a little better.

Q. Your recollection? A. That's right.

Q. In other words, your recollection,—are you telling us now that your recollection today is better than it was the day after this accident happened? A. No, sir, I'm not. I'm going to tell you, the day after the investigation I went out and looked it over and it was a little different. I gave that to the best of my ability at that time.

Q. I don't think we are in any doubt about what happened, are we? A. Well, you tell me, and I'll tell you whether you are.

Q. You were coming in at 12 to 15 miles an hour. There isn't any doubt about that, is there? A. That's correct.

Q. And it was closer to 15? A. Well,—no, it nearer 13 than 15.

Q. You think it was nearer 13 than 15? A. That's right.

Q. Can we agree it was about 13? A. That's right.

Q. All right. If I said that 20 feet per second was 13-1/2 [49] miles an hour, would you agree that you were going about 20 feet a second when you came in? A. Oh, I would have to, because you can't tell the exact mileage on the speedometer. It runs from 1 to 5, and if you're in between 10 and 15 you have to guess at the exact mileage in there because

Q. At what speed did you come down from Boston? A. You mean the top speed?

Q. Yes. A. 90 miles an hour.

Q. 90 miles an hour? A. At certain places where they allow it.

Q. All right. I have no quarrel with it or make no criticism of it. A. O.K. That's the railroad rule.

Q. You start out from the South Station and you went out through Forest Hills, didn't you? A. That's correct.

Q. Could you give me an idea what speed you were going at when you passed Forest Hills? A. Around 60.

Q. Around 60. And at some further point—did you stop at 128? A. Yes, sir.

Q. And at what speed did you come into 128, when you slowed [50] down? A. I was going about 82 miles an hour when I put the brake on for 128.

Q. When you put the brake on at 82 miles an hour to stop at 128, you don't put the emergency on, do you? A. I hope not.

Mr. Kelleher. Well, now, may that go out, your Honor?

The Court. Well, I see no reason why that remark may not stand on the record. The question produced an answer one might expect.

Mr. Kelleher. I have no quarrel with it but I know nothing about these brakes.

The Witness. You know—

The Court. Well, you know now from the answer.

Q. You put them on gradually, don't you? A. Positively.

Q. Whenever it is possible to do so? A. Except in emergency.

Q. And that is a case where it is not possible to do so. If you have the space you put them on gradually, don't you? A. Do you want me to explain how we apply the brakes?

Q. No, I want an answer to that question. A. What was the question?

Q. The question is, When you have occasion to apply your brakes [51] you put them on gradually if it is possible to do so, do you not? A. Positively.

Q. Will you answer that question Yes or No? A. That is right.

Q. All right. And one of the considerations that enter into it, is that you might derail the train if you put them on suddenly?

Mr. Deering. I object to it.

The Court. I think the witness can take care of himself.

A. I don't believe you would ever derail a passenger train putting them into emergency.

Q. Even at 80 miles an hour? A. Even at 100 miles an hour.

Q. When you put the brake on for that sudden stop on the morning of October 11th you put them on in emergency without any gradual application? A. Positively.

Q. No doubt about it? A. There isn't any doubt about it.

Q. Had you had occasion to brake the train when you—you got down to a speed of about 15 miles an hour when you

were somewhere within 400 or 500 feet of the station? A. We put the brake on way back two miles from there because [52] there are 50-mile curves up there and we put it on so that you slowed down to about 15 miles an hour going around these curves.

Q. You put it on and off, on and off; is that the way you do it? A. Oh, no; oh, no.

Q. Well, please explain it. A. I would like to explain.

Q. All right. A. We leave the throttle open two or three notches so we won't get no yank on the train, and we draw off 10 or 15 pounds brake pipe pressure. That applies the brakes to the train, and then we shut the throttle off, but if we find out we're not going—if the speed is not reducing fast enough we draw off a little more, put the brakes on a little harder.

Q. That means that the brakes, if I understand it,—the brakes while they are on are on continuously, they are not pushed on and off? A. No, they are not released and put on, if that is what you mean.

Q. They're under 10 pounds pressure, whatever it is? A. That's it. Whatever you draw off.

Q. It's not like—you drive an automobile? A. I do, yes.

Q. Most of us who drive cars don't know anything about locomotives. [53] You know it is possible to brake a car if you're going 60 miles an hour by pushing the brake and leaving it off, pushing it and leaving it off. That is the way this thing worked? A. No.

Q. That is the way you do it. You put it on at half pressure, so to speak? A. I wouldn't say half pressure.

Q. Quarter pressure. All right, what's wrong with that? A. O.K. Well, if we put it on half pressure it would put the brake on too hard and probably stop the train.

Q. But you put it on at some pressure and leave it on? A. No, we don't release it, not entirely.

Q. How do you operate this brake? What kind of an implement do you have? A. We have a brake valve handle.

Q. What does it look like? A. Well, it's a big iron casting about that big [demonstrating] with a brass handle on the top.

Q. Does it move horizontally or vertically? A. It moves to the right in five positions: Full release, running, holding, lapse, service, emergency.

Q. I see. And it has notches into which it fits? A. That's right.

Q. When you move it? A. That's right.

[54] Q. And the emergency is the extreme right? A. Right, yes, sir, that is correct.

Q. So that when you put the brake on at Providence Station you shove it in way over to the right? A. That's right. And left it there. That is the rule.

Q. Some rule makes you do that? A. I beg your pardon?

Q. Some rule you are talking about makes you do that? A. Makes me do what? When you put the brake in emergency you put it over to the extreme right and leave it there until you stop. That is the company rule.

Q. Now I want to be clear about this statement you made on October 12, Mr. Craft, and I hope you will believe I am not criticizing you. I merely wanted to ask you about certain things that seem to require a little explanation. A. All right.

Q. You observed this question on the first page of Exhibit 4 [pointing]. Will you look at it? It's the third question, and there is a long answer, the first long answer. A. Yes.

Q. Now let me call your attention to something in that answer. You say here in the second sentence of that answer—I am pointing it out to you now. A. Yes.

Q. The first sentence is—

[55] "A We were coming into Providence Station between 12 and 15 miles per hour. It wasn't quite 15, and we got up into Providence Station on the curve and I saw this woman step out on to the track and go towards the fence."

Now let me stop there. The fact is that you never saw the woman step off the platform? A. Until she stepped out into the track.

Q. You saw her step out into the track? A. I seen her step into the track.

Q. You never saw her step off the platform? A. No, sir, I don't believe I did, until she stepped out into the track.

Q. And actually you say later that you never did, don't you? A. That's right.

Q. There's a question on Page 2 in which you are asked,

"Q You didn't actually see this lady walk from the platform to the track? A. Oh, no."

A. From the platform to the track but I seen her on the track.

Q. All right. But we're talking about seeing her step off the platform. You never saw that, did you? A. No, because I seen her step on to the track. She was on the track when I seen her.

Q. Well, now, there is no need of—I don't mean to fence [56] with you. A. Oh, no. I'm trying to be honest and fair.

Q. Of course you are. You think that lawyers all quibble. Here is the platform [illustrating]. I have my foot on it. Now when I say you didn't see her step off the platform on to the track i mean you never saw her when she had one foot on the platform? A. No, sir.

Q. No doubt about that? A. No, sir.

Q. And you say there was something that stopped you from seeing her? A. Well, that's why I said I corrected my statement afterwards. There was these trucks out there that I changed my mind about after I had the investigation. I went out, back, and asked them if the trucks were there, and they said, yes.

Q. Whom did you ask? A. Well, I asked the baggage man there, and I asked, I think, two or three workers around there.

Q. You asked the baggage man at the Providence Station? A. Yes.

Q. Who was he? A. I couldn't tell you his name.

Q. What is his name? A. I don't know his name. He said he had a tag on his cap [57] that said "Baggage" on it. I don't know the man's name.

Q. Was it a New Haven cap? Did he work for the railroad? A. Oh, the baggage men certainly do work for the railroad.

Q. When did you talk to this man? A. On the 12th, after the investigation.

Q. After the hearing this morning? A. This morning of the 12th.

Q. Now let's be precise about this. I call your attention that according to this record the hearing concluded at 12:20, 20 minutes after noon. A. Yes.

Q. Is that right? A. That's right.

Q. Is your recollection correct, that it did conclude then? A. Yes, I think so.

Q. All right. When did you talk to the baggage man? A. Probably 15 minutes afterwards. I walked out of the office and out on to the track.

Q. He told you that there were some trucks— A. That's right.

Q. Where? A. On the east end of the station. It's about before you get to that canopy you have drawn there.

Q. I hate to make you do all this work, Mr. Craft, but I'm going to ask you to point it out to us. Will you tell me? [58] Will you please come over? A. Well, I tell you, sir. That blueprint you've got there is not much good but I'll look at it.

[Witness leaves the stand. Discussion off the record.]

Q. Will you come over here and show me personally where you mean, and show Mr. Deering?

[Witness points out to counsel the spot in question on the blueprint.]

Q. Will you show it to me now on Exhibit 2a, the picture? A. Yes, that's it [pointing].

Q. Will you show— You had some conversation with the baggage man? A. Yes.

Q. After 12.20 p.m. on October 12th? A. Yes, sir.

Q. And you talked about some baggage trucks that were on the platform; is that right? A. That's right. I asked him about them.

. . . . . .

[59] Q. You do say that you didn't see Mrs. Montell step off the platform? A. That is correct.

Q. Let's see when you first did see her. Do you see this line of floor blocks [pointing]? A. Yes, sir, I can see it.

Q. This I think is 54 inches, so that is approximately the distance between the two rails, isn't it? A. Yes. 5.8-1/2 or 9 inches is the width.

Q. And you say you saw her in the center of the rails? A. I didn't say that. I didn't see her until she got on the track. She could be on either side. I was facing her. I could see her when she got on the track. She was to the

right more the way I saw her. She wasn't on the track any [60] time when she wouldn't clear the engine.

Q. Well, all I'm trying to find out is when you first saw her. A. I think I explained it to you but you don't seem to grasp it somehow.

The Court. Well, now, now. If you don't mind—

The Witness. I beg your pardon.

Q. Can we begin this way? The platform is over here where I am standing. Let us assume that. A. Yes.

Q. Did you see her there? A. No, sir.

Q. All right. Let us assume the first rail is right here. Did you see her before she got to the first rail? A. Before she got to the first rail?

Q. Yes. A. I didn't see her until she got her foot over the rail, in the middle of the rails.

Q. Over the rail? A. Yes, that's right.

Q. So you saw her when she was about like this [illustrating]? A. That's right.

Q. First. A. That's right.

Q. All right. And after you saw her she went over to the other rail? [61] A. No, she didn't. She headed that way, but she turned.

Q. Didn't you testify in the transcript that when you first saw her she was facing south? A. She was facing south. She came off the rail facing south.

Q. She was moving across your line of vision; isn't that so? A. Well, I should say it was. She was moving across my line of vision.

Q. And as a matter of fact don't you say in your transcript, to go back to the exact words in it, don't you say she went over to the track nearest the fence? A. I don't believe I said nearest the fence.

Q. Now wait a minute, wait a minute. Perhaps I'm in error. A. I believe you are.

Q. Well, you were asked this question, and this is on the first page of Exhibit 4, which is the statement of October 12:

"Q Was the woman in the center of the track or more towards the fence on the south side?"

Now do we agree that the south side is this side over here [indicating]? A. That is right.

Q. Now what do you say your answer now to the question was? A. She didn't go to the fence. She was facing the fence when she stepped on the track. When she was on the track she was facing the fence. She didn't walk on the track sideways.

Q. When you first saw her she was on this side of the track [62] towards the fence? A. Oh, no, no.

Q. Well, let me read this question and answer. A. I don't care.

Q. All right. [Reading]:

"Q Was the woman in the center of the track—"

That would be right here, wouldn't it [pointing]? A. Yes.

Q. [Reading]:

"—or more towards the fence on the south side?"

A. That's right.

Q. [Reading]:

"A When I first saw her she was on the track towards the fence. . . ."

A. Well, that was wrong. That was absolutely wrong because—that was absolutely wrong.

Q. All right. Would you say she was? Was she back here [pointing]? A. She was back stepping over the rail, the right rail.

Q. When you first saw her she was just stepping over the rail? A. Stepping over the rail, yes.

Q. Now will you tell us—do you want to come down here and show us what she did rather than have me ask it? A. Well, I don't mind.

The Court. Now, now, phrase that in the form of a [63] request, not in the form of a question.

Q. Now let us understand which rail is which. Now this is the way she was facing. She stepped off the platform and which way was she facing. Let's get this straight for the record. Will you let this line here be one rail. The rails are coming down this way. What did she do? A. Well, she stepped off the platform, over this first rail.

Q. You didn't see her step off? A. I didn't see her step off.

Q. After she stepped over the first rail then what did she do? A. Well, when she went towards the fence and knelt down I put the brake on emergency. I knew she had no intention of getting off the track.

Q. Well, never mind her intentions. Will you tell us what she did? A. She stepped over toward the fence. She didn't get to the fence. Towards the fence she turned and knelt down.

Q. Did she step over the second track? A. No, no, she was between the rails.

Q. Did she get as far as the second rail? A. No, no, she went towards the fence.

Q. So you want to leave it, when you first saw her she had just stepped over the rail nearest the platform? A. That's correct.

Q. And then she, still facing south, whereas you were coming [64] from the easterly direction— A. That is correct.

Q. —still facing south she takes the next step? A. I didn't get that last one.

Q. She takes at least another step? A. Towards the fence, that's right, yes. South.

Q. By the way, you are familiar with this fence? A. Oh, I guess so.

Q. You know at the point where she was there is no opening in the fence? A. No, there wasn't.

Q. She couldn't have been going any place? A. That's right.

Q. And you knew that because you were familiar with the station? A. That's right.

Q. Now are we agreed on one more thing: That when you first saw her and she had her foot over the first rail you did not then put your brake on? A. No, sir.

Q. You didn't? A. No, sir. I thought there was something dropped on the track and she was going to turn it in, pick it up and get off the track.

Q. And she took a step after that and you didn't put your [65] brake on then either, did you? A. Oh, no, when she took one step and turned I knew she didn't intend to get off the track.

Q. Please, please, let us take one step at a time. A. All right.

Q. Before she turned she took another step? A. She took one step toward the center of the track.

Q. And when she took that step you didn't put your brake on, did you? A. Not until she knelt down, no.

Q. You didn't put your brake on until she turned and knelt down? A. That's correct.

Q. And you did it then, according to your own statement, because that is the first time you figured she couldn't get off the track? A. That's right.

Q. Up to that time you figured she could get off the track? A. That's correct.

Q. Is it fair to say, Mr. Craft, that this woman, Mrs.

Montell, this unfortunate woman who was killed, was on the track for some seconds before you put your brake on? A. Well, very few.

Q. Some seconds? A. Very few.

[66] Q. Some seconds? A. It doesn't take long. Very few.

. . . . . .

Q. I want to refer, Mr. Craft, if I may, to another one of your answers. It is on Page 2 of this examination of October 12. Let me show it to you. The question was by Mr. Murtaugh:

> "Q How far ahead of your engine was this woman—"

that is Mrs. Montell,

> "—when you first saw her? A I would say she was 20 or 30 feet. It's a guess."

[67] A. That's right. It was a guess.

Q. Isn't it clear that it must have been far more than 20 or 30 feet, Mr. Craft? A. I wouldn't say it was far more. It might have been a little more, because I, at that time my mind was on the woman on the track, not on the feet that I had to go.

Q. Let me suggest this to you. Have we agreed, or have we not agreed, that you were going about 20 feet a second? Are you satisfied with that, Mr. Craft? A. Yes.

Q. Now when you first saw her she had her foot over the first rail; is that what you said? A. That's what I said.

Q. So that, if you were 20 feet away, that's about as far away as you are now, isn't it? A. Pretty near it.

Q. If you were 20 feet away, do you see that in a second you would have been at this point?

Mr. Deering. Well, I object to this.

The Court. I think that is a perfectly proper question. Go ahead. Is it right or isn't it? Would you be there in a second?

The Witness. I didn't say.

The Court. No, would you be there in a second?

The Witness. I believe I would in 20 feet.

[68] Q. All right. What you are telling us then is, in a second this woman took a step, turned around and knelt down, and you ask us to believe that was in a second? A. I said it was a guess.

Q. Right. A. I said it was a guess. It could have been a little more, it could have been a little less. I wasn't measuring feet at that time, sir.

. . . . . .

[69] Q. I suggest to you, that if you reflect about what you are saying that in a second you would have been down to where this woman was killed; if you reflect on what you are saying to us is, that in a second she had taken a step, turned around and knelt down, it could not have happened in a second, if you use your common sense; isn't that so, Mr. Craft? A. That isn't so because I only guessed. I was guessing at the distance I was from the woman. I didn't give the exact measurements, sir. It could have been 40 feet away, or 35. I only guessed. My mind was on the woman, not the feet away from her.

Q. Actually your mind was on the woman, wasn't it? A. No, no, no.

Q. I don't want to interrupt you. Didn't you say on October 12 that you were looking beyond the woman? A. I did look beyond the woman. We always do, then look back again. We don't always stay looking that way.

Q. You were asked this question. This is on Page 1 of Exhibit 4, Mr. Craft:

"Q In relation to the station platform between Tracks 3 and 5, when did you first notice this [70] woman? A I didn't notice this woman until she was stepping on to the track. I might have been looking a little beyond her at the time."

A. That could be possible.

Q. Was that a correct answer when you gave it? A. I could have looked beyond her.

Q. Didn't you notice her when she was stepping on to the track? A. Not until she got on to the track, no, buf I could have looked beyond that point.

Q. In other words, this was a crowded platform? A. Not where she was it wasn't crowded. The west end of the station was crowded. There were 200 people.

Mr. Kelleher. No further questions at this time.

The Court. All right. Cross-examination.

Cross-examination by Mr. Deering

XQ. Mr. Craft, when you first saw this woman on the track was she moving or standing still? A. She was moving.

XQ. And moving towards the fence? A. The fence, that's correct.

XQ. And just stepping with one foot over the first rail, and that is the rail nearest the platform? A. That's right.

[71] XQ. And when she knelt down facing the engine, what did you do then? A. I put the brake in emergency.

XQ. And how far did your train go after the emergency application? A. I would say 10 feet less than the length of the diesel, probably, probabiy 70 or 80 feet.

XQ. 78 feet is the length of the diesel? A. Yes. About 10 feet less.

XQ. So that you went— A. About 68.

XQ. About 68 feet? A. That's correct.

XQ. And then when the application was made how fast was your train going at that time? A. When I put the brake in emergency?

XQ. Yes. A. Between 13 and 15 miles an hour.

XQ. Had there been any change from the time you first saw the lady up until the time the first application was made? A. I can't understand.

XQ. Had there been any change in the speed? A. Oh, no, no.

XQ. You were going in at— A. There's a little upgrade going in there and I might have [72] been going a trifle slower.

XQ. At approximately that speed which you say was about 13 miles an hour? A. About 13 miles an hour.

XQ. And as you were coming in there at 13 miles an hour you expected to make your station stop? A. That's right, sir.

XQ. How far did you stop short of the actual station stop? A. Another guess. Six or eight car lengths.

XQ. That is, you were intending to go six or eight car lengths beyond the point where you actually stopped? A. That's right.

XQ. That would have brought the entire train to the platform or adjacent to the platform? A. That's right.

XQ. So that you could have unloaded or discharged passengers at that point? A. That's correct.

XQ. Now up to the time that you saw the woman step on to the track had you noticed anything out of the ordinary there at the station that morning? A. No, nothing.

XQ. And could you see people on the platform as you came in there that morning? A. Yes, sir.

[73] XQ. And up until the time that this woman stepped out on the track was there anybody that was near enough to the track to come to your attention, anything unusual? A.

I said before, I thought, and I will say, I don't think there was. I don't know for sure.

. . . . . .

XQ. It is the fact, isn't it, Mr. Craft, that you were slowed down some distance before you actually got into the station at Providence? A. That's correct. That's right.

XQ. And you had slowed down from a speed, you said, which was [74] at times as high as 80 miles an hour until you had come down to this speed of 13 miles an hour? A. 13 or 15 miles an hour.

XQ. 13 or 15 miles an hour? A. That's so.

XQ. And whether or not a speed of 13 to 15 miles an hour at that point was a speed that you would have been able to reduce to a complete stop in six to eight car lengths? A. She would practically have stopped herself or with a real light brake application.

XQ. That was on the regular brake application? A. That's right, sir.

XQ. Had you made some kind of a brake application with reference to making a regular stop there before you saw this woman? A. The application was made about three-quarters of a mile east of the station.

XQ. The application that you made three-quarters of a mile east, that would have been made in contemplation of stopping at the Providence Station? A. That is correct.

XQ. You made no further application up to that point? A. That is correct.

XQ. So there had been a gradual reduction from that point until you reached the point where you put on the emergency brake? [75] A. That is right.

XQ. And when you put on your emergency brake you testified as to how far it took you to stop. A. That is right.

Mr. Deering. I think that is all.

The Court. Any further examination?

Mr. Kelleher. I have one or two questions.

The Court. Go ahead.

Redirect Examination by Mr. Kelleher

Q. You stated, Mr. Craft, that you noticed nothing out of the ordinary occurring on the platform as you came into the station? A. That is correct, yes.

Q. You noticed the baggage carts there? A. Well, I testified to that once and I was told it wouldn't go. I spoke to somebody about it and they said it was there.

The Court. Now, I think I'd better stop you. The question is, did you see the baggage cars?

The Witness. No.

The Court. All right.

Q. You didn't see [illegible]? A. No, sir. You mean baggage trucks, not cars.

Q. Yes.

The Court. I am sorry.

Q. Baggage trucks. [76] A. That's right.

Q. On the platform? A. Yes, sir.

Q. You didn't see them? A. No, sir.

Q. That is your present recollection? A. That's right.

Q. Did you see anything else there which obstructed your vision of the platform? A. I don't believe so.

Q. Do you know? A. No.

Q. You may have seen something?

The Court. Well, "may" is a very large word. I may have seen it, too. I didn't happen to.

Q. You have a recollection of whether you did or did not see anything on the platform that day which would have obstructed your view as you were coming in. Do you now remember or don't you, Mr. Craft? A. I believe there was trucks there.

Q. You believe.

The Court. The question is, do you now recall there were trucks there?

The Witness. No, I wouldn't say that, your Honor.

The Court. All right.

The Witness. I would just say there was [77] nothing there. That will end that.

The Court. Well, what is your final testimony on this? You have no recollection at all of the baggage trucks?

The Witness. That's right.

Q. Do you remember the platform? Have you a vision of it now in your mind, Mr. Craft, as it was that morning? A. Beg pardon?

Q. Can you now picture it in your mind? A. I wouldn't say for sure that I could picture everything in my mind as it was that morning. I was awfully nervous that morning after that happened and—

Q. Again, I'm not criticizing you. A. I'm not saying you are criticizing me, Mr. Kelleher.

Q. All I want to know now is, do you remember there was anything on that platform except what was holding the canopy up and a few people? Do you remember now whether that is so, or can't you remember at all? That's all I want to know. You just don't remember, is that it? A. Oh, I wouldn't say that. I remember all right. But I—

Q. What do you remember, then? A. Well, there was an ice truck there, a yellow truck, an ice truck, if you really want to know what was there, a yellow truck that they ice cars with.

Q. I do want to know. A. Well, then, you've got it, you've got it.

[78] Q. So does the jury. A. You've got it right there.

Q. Where was it? A. On the east end of the station.

Q. Show me on the chart. A. I can't show you nothing on that chart.

Q. You come over here and show me. [Witness leaves the stand.] Find it and then please talk with Mr. Deering.

[Witness confers with Mr. Deering.]

The Court. Please don't talk out so the jury can hear you.

[A pause.]

Q. Please come here for a minute, Mr. Craft, so you can show the jury. You are now referring to a point on Exhibit 2a; is that right? A. Yes.

Q. Will you show the jury where the truck was?

The Court. A little louder.

The Witness. The truck was just the other side of this crossing here. There was a baggage truck, I can remember now, and an ice truck, where the woman's coat was on the baggage truck. She didn't take her coat with her. I can remember there was a baggage truck here and an ice truck there, and a woman's coat was on the truck.

Q. Will you please come back to the stand? [Witness returns [79] to stand.]

Do you now say that there was nothing unusual on the platform that morning? A. There was nothing unusual.

Q. In other words, is it correct to say the presence of a baggage truck and an ice truck where you have pointed them out was a usual and expected event?

The Court. Wait a moment. You've turned around a little bit. The question was as to whether it was unusual.

Mr. Kelleher. Please strike the question out.

Q. Is it fair to say that the presence of a baggage truck and an ice truck at the point where you say they were was not unusual? A. That is correct.

Q. That is correct. It happened more than once in your experience? A. Oh, yes.

Q. And you weren't at all surprised by it? A. No.

Mr. Kelleher. No further questions.

The Court. That is all.

Mr. Deering. Well,—

The Court. Oh, you think there was something new raised on the redirect?

Mr. Deering. No, there is one thing I neglected. [80] I wanted to show in a photograph the locomotive but I neglected to do it.

The Court. All right. That is fair enough. The locomotive in any event is before the jury.

Mr. Deering. I don't know whether the jury has seen it.

The Court. You may show it to them. Is there anything special you want to say about it?

Mr. Deering. I just wanted to have him point out where he was.

The Court. Oh, you may do that, certainly. Step over and show it to the jury. Just point to where you were at what time?

Mr. Deering. As he approached the Providence Station.

The Court. You mean, when he first saw the woman?

Mr. Deering. Well, at all times.

The Court. Well, I don't know about all times. When you first saw the woman on the track where were you? I don't think he had better confer with you. He's a witness at the moment.

Mr. Kelleher. I don't object.

The Witness. I was just telling him, your Honor, that is the locomotive we had.

The Court. All right. That's not the right locomotive?

The Witness. That is the one we had that day.

[81] The Court. Is it the same type of locomotive?

The Witness. It is but there were some attachments.

The Court. Well, it is understood then that picture is not the way the locomotive looked; is that correct?

The Witness. It is, your Honor.

The Court. All you are being asked is where in the cab were you located when you first saw Mrs. Montell on the track.

The Witness. On the right side of the cab.

Mr. Deering. Can you come over and show the jury where your place in the cab was?

The Witness. That [pointing] is the right side. I sat right here at that window.

The Court. All right. That's all. We don't want you to go into anything more.

Mr. Kelleher. There is one question I had forgotten.

The Court. All right.

Q. [By Mr. Kelleher] Who was sitting next to you, Mr. Craft? A. You mean in the cab with me?

Q. Yes. A. The fireman was in the cab with me.

Q. What is his name? A. Paul Lewis.

Q. Was he called at the hearing on October 12, 1954, or do you know? [82] A. He was not.

Q. He was not. But at the time of the accident was he sitting next to you? A. Well, he was across the cab.

Q. Well, I mean— A. If you want to call that next to me, that's O.K.

Q. He was sitting there peering through the front window? A. Well, he couldn't see nothing but curves. The curve was on my side.

Q. He was sitting there. There are two seats, are there? A. Yes.

Q. And he was sitting on the one to the left of you? A. That is correct.

The Court. Anything else that was said about what the visibility was you will disregard, Members of the Jury.

Mr. Deering. Well, may I ask another question?

The Court. Well, I think this has gone on about long enough.

Mr. Deering. Well, something has been brought up about the position of Mr. Lewis in the cab, and I wanted to clear that up.

Re-cross-examination by Mr. Deering

XQ. Mr. Craft, you had a seat on the extreme right; is that so? A. That is correct.

XQ. On the right-hand side. Is it fair to say that Mr. Lewis [83] sat on the extreme left-hand side? A. Left-hand side.

XQ. And your view was through the windshield on the right? A. No, my view was through the front windshield on the right.

XQ. On the right-hand side? A. Yes.

XQ. And his view would be through the windshield on the other side? A. That is correct.

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[84] ELEANOR STEINFELD, *Sworn*

Direct Examination by Mr. Kelleher

Q. What is your full name, Miss Steinfeld? A. Eleanor Steinfeld.

The Court. A little louder. I cannot hear you.

The Witness. Eleanor Steinfeld.

Q. Where do you live, Miss Steinfeld? A. 246 Central Street, Auburndale.

Q. In October of 1954 were you employed by the New Haven Railroad? A. Yes.

Q. In what capacity? A. As an attendant to the Dining Car Department.

Q. You traveled back and forth in dining cars on the railroad? [85] A. Yes.

Q. Was it a part of your duty to serve food? A. That's right.

Q. On October 11, 1954, were you traveling on a dining car or club car of a train that left Boston about 8 o'clock in the morning for New York? A. The train left at 7.

Q. The train left at 7. Were you working on the train that day? A. No.

Q. Were you traveling on a pass? A. Yes.

Q. You were to take up your duties at the other end of the line in New York? A. Yes.

Q. Can you describe the car on which you traveled that day? A. Well, it was a grill car, it's called the grill car, which took the place of the dining car.

Q. Will you describe it for us a little bit? A. Yes. It has two rows of seats and tables on the side.

The Court. Have you a photograph?

Mr. Kelleher. I don't know whether there is one or not.

The Court. Do you have a photograph?

Mr. Deering. No, I don't. I'm sorry.

[86] The Court. I think most of us know what it is like—but go ahead.

Q. It has a row of seats on each side? A. On each side.

Q. One on each side? A. One on each side; and there are two glass partitions in the front just as you approach the tables from the end coming into the grill car. There's a counter in back of the glass partitions.

Q. So that the counter—is that where you get the food? A. Yes.

Q. The counter is in front of the car or the back? A. In front.

Q. In the front of the car. And between the counter and the seats, as I understand it, there is a glass partition? A. That's right.

Q. Are there benches along the wall? A. Yes, there's a long bench.

Q. Tables in front of the benches? A. Yes.

Q. And are there chairs also at the tables? A. No, it's just one long bench, and then a table.

Q. I ask you to cast your mind back to the time when you were traveling in the train as it was approaching Providence. Will you tell us where you were in the car at that time? [87] A. I was sitting at the first table next to the glass partition.

Q. I wonder if we could draw a little picture of this car [going to blackboard]. You say there were benches along each side of the car? A. Yes, except until you get to the end nearer the door.

Q. [drawing] This is the front of the car. And there is a counter there? A. Yes.

Q. Could you draw this for us, showing us where you were at the table?

[Witness leaves the stand and goes to the blackboard.]

A. I will say this is the counter here [drawing], and these are glass partitions. Those are tables.

The Court. A little louder. I can't hear you.

The Witness. As you come into the grill car here there is a counter right here, and there is a glass partition and a table which are lined up here, and this is a long bench, and this is separated off a little for seating.

Q. Can you mark that, Miss Steinfeld, with something? Use an "X" to indicate about where you were sitting. A. Right here [marking], right next to the partition.

Q. Will you go back to the stand now, please.

[Witness returns to stand.]

[88] By the way, is there some kind of kitchen on this car also? A. Yes.

Q. Where is that? A. Right in back of the counter. You can't see it.

Q. And is there a man on duty at the counter? A. Yes, there is. On this particular train there was one man.

Q. And he gets the food from the kitchen? A. Yes.

Q. And passes it out to the attendants at the counter? A. Yes.

Q. Are you acquainted or were you acquainted at that time with Mary Donnelly, the plaintiff in this case? A. Yes.

Q. And how long did you know her approximately? A. Well, let's see. I met her when I went to work for the railroad, which was six years ago.

Q. So you met her about 1952? A. 1952—or 1953, I guess.

Q. And had you on occasion worked with her in the course of your work? A. Yes.

Q. Did you observe her in the car that day? A. Well, I had been talking to her.

Q. Was she working? [89] A. Oh, yes.

Q. Could you give us an idea—you say this car seats 48 persons? A. Yes.

Q. Could you give us an idea how many there were on the car that morning just before you got to Providence? A. Well, there weren't too many people. I would say about, maybe 15 or so.

Q. Did something happen as this train approached Providence that morning? A. Yes.

Q. Will you describe for us in your own words what occurred? A. Well, just before Providence the train stopped suddenly, without any warning, and everything that was in the car fell to the floor, the glasses and the trays, everything was in piles on the floor, and one of the girls who was the hostess, she fell to the floor; so, as the train was finally stopped I jumped up to go and help the hostess, I helped her, then I went over to Mary, who was leaning against the counter or something, and she couldn't

move her neck, so we took and sat her down at the table. She was quite hysterical.

Q. Let's see. You marked where you were sitting. Is that the table you took her to? A. That's right.

Q. Did you observe where she was just before this event [90] occurred? A. No, I couldn't say just where she was.

Q. Well, will you tell us at which end of the car it was? A. Well, it was at the end near the counter.

Q. That is this end here [pointing]? A. At that end of the car.

Q. Was she in the course of that time, shortly before this event occurred, performing her duties? A. Yes.

Q. Was she standing or sitting? A. Standing.

Q. Is it your best recollection she was standing at or near the counter? A. As far as I can remember.

Q. Prior to this occurrence you say there were various objects on the tables, as I understand it, that is, dishes and that sort of thing? A. And trays.

Q. And what happened to those? A. Well, they all fell to the floor.

Q. You have referred to another person besides Mrs. Donnelly—the hostess. A. Yes.

Q. What was her name? A. Aileen Driscoll.

[91] Q. Aileen Driscoll. And where was she immediately before this event occurred? A. Well, she was at the other end of the car. She had to total the checks, so she was at the other end of the car doing something.

Q. By that you mean she was at that end of the car? A. At that end of the car.

Q. And did you observe her at the time this stop occurred? A. Yes.

Q. And will you tell us in your own words what happened to her? A. She fell to the floor, as I remember it.

Q. You were seated in this part of the car here [pointing]? A. Yes.

Q. Can you tell us what happened to you? A. Well, nothing happened to me.

Q. You remained seated? A. Yes.

Q. And as I understand it, you immediately went to the assistance of Mrs. Donnelly? A. Yes.

Q. Were you alone in going to her assistance? A. Oh, no, someone else also.

Q. Did she complain of pain at that time? A. I didn't hear you.

[92] Q. Did she complain of pain at that time? A. Yes.

Q. Can you tell us what she said, if you remember? A. Well, she couldn't move her neck. That's one of the things she said.

Q. After you had taken her over and seated her on the bench what happened from then on, Mrs. Steinfeld? A. Well, she was quite hysterical, and she wanted to get off the train immediately, and she couldn't work, so we called the conductor and they took her and Miss Driscoll off the train.

Q. You don't know what happened to her after that? A. No.

Q. Did you work the rest of the trip? A. Yes.

Q. Was food served during the rest of the trip to New York? A. Yes. Well,—yes, not much. Toast and coffee.

Q. Were you working as a regular attendant at that time, or were you simply filling in? A. Just filling in.

Q. You had what is called a spare board; is that it? A. Yes, that's right.

Q. How do you—I don't want you to tell us how much you were paid but how were you paid on the job? By the hour? A. Yes, we were paid by the hour.

Q. In addition to the payment you received from the railroad, [93] Mrs. Steinfeld, were you compensated by way of tips? A. Yes, we were.

Q. What would be a full schedule per week, how many hours? A. For an attendant working full time?

Q. Yes. A. Well, at that time I think we were making about a dollar sixty-five an hour, which averaged about a 7-day week in pay; and tips—

The Court. No. The fact that you got tips is admitted. The fact that a certain waitress gets a certain number of dollars in tips may reflect something quite personal, and the amount would have to be shown by the production of evidence of what the plaintiff pays by way of income tax or something which directly relates to her, not to some other person who might or might not get a different rate.

Mr. Kelleher. No further questions.

Cross-examination by Mr. Deering

XQ. I think Mr. Kelleher asked you whether you knew this waitress as Mary Donnelly Henagan. A. Yes.

XQ. That is, you knew her as Mrs. Henagan rather than Miss Donnelly? A. No, I knew her as Mary Donnelly.

XQ. You knew her as Mary Donnelly. But did you also know her [94] as Mrs. Henagan? A. No, I knew that she was married but I didn't know her name.

XQ. You knew she was married, and that was her married name; is that correct? A. Yes.

XQ. But she always went by the name of Mary Donnelly when working in the dining car? A. Yes.

XQ. And you had worked with her on numerous occasions before that day? A. Yes.

XQ. And on this trip going down to New York, at the time this incident occurred you were not actually then on duty? A. No.

XQ. And you had no expectation of working any time on that trip; is that right? A. No.

XQ. When did you expect to go to work? A. When I arrived in New York.

XQ. P .t as a result of Miss Donnelly and the other girl leaving the car you were asked to take over some of their duties; is that right? A. That's right.

XQ. And you did work the rest of the way down to New York? A. Yes.

[95] XQ. And served food on the way to New York? That is, you're shaking your head. Is the answer, Yes? A. Yes.

XQ. And at the time the accident happened you say you were seated in a seat which was in the position as indicated by the "X" on the blackboard? A. Yes.

XQ. And would that be in the forward end of the car as the train was proceeding that morning? A. Well, yes; as the train was going, that's right.

XQ. And the counter up here beyond that was at the forward end of the car? A. Yes.

XQ. And you were seated on a bench that ran lengthwise of the car? A. Yes.

XQ. And when the car stopped you just remained seated; is that right? A. Yes.

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[96] AILEEN F. DRISCOLL, *Sworn*

Direct Examination by Mr. Kelleher

Q. What is your full name, Miss Driscoll? A. Aileen Florence Driscoll.

The Court. I'm sorry but I didn't get it, Miss Driscoll.

The Witness. Aileen Florence Driscoll.

Q. You will have to speak louder. A. I'm sorry.

Q. Where do you live? A. 543 Poplar Street, Roslindale.

Q. In October of 1954 were you employed by the New Haven Railroad? A. Yes, I was, sir.

Q. In what capacity? A. Hostess.

Q. At that time were you acquainted with Mary Donnelly? A. Yes. She was my attendant.

Q. You were hostess in a car which made a trip from Boston? A. Yes, sir.

Q. On October 11, 1954? A. Yes, sir.

Q. And that was the so-called grill car, was it? A. Yes, sir.

Q. There is a little diagram on the board here, Miss Driscoll, [97] I wish you would look at. The car had benches on either side? A. Right.

Q. With tables in front of the benches? A. That's right.

Q. And in the forward part of the car there was a glass partition, was there? A. Yes. A partial. There was a separation from the washroom.

Q. And behind the partition was a counter? A. Yes.

Q. Where the attendants got the food they served to customers? A. Yes.

Q. And there was some kind of a kitchen here somewhere in the car? A. That would be just beyond the counter box there.

Q. There would be a man on duty at the counter, would there? A. That's right, yes.

Q. Where was your—in what part of the car would you normally be when you were performing your duties as hostess? A. Through the entire car, back and forth.

Q. Did you have any particular station? A. No, no; as hostess I covered the entire car.

Q. That train we are talking about left Boston on October 11, 1954, bound for New York; it left about seven in the morning? A. That is right.

Q. At some time that train commenced to come into the [98] Providence Station, did it not? A. Yes.

Q. Can you tell us where you were in the car at about that time? A. I was at the extreme end of the car, where we had our air conditioning and lighting boxes.

Q. You were down at this end here [indicating on diagram]? A. That's right.

Q. There are some air conditioning facilities there? A. Yes, we had all our mechanical business there for lighting and air conditioning, and I was at the extreme end of the car, at the rear door.

Q. Were you doing something with those installations? A. Yes.

Q. Adjusting them in some way? A. That's right.

Q. At the time you were in entering the station something occurred, did it not,—some event occurred? I want you to describe it for us. A. Approaching the station?

Q. When you were entering the station. A. Well, yes. I was at the rear—as I said, at the light box.

Q. And what happened?

The Court. What you observed? What did you see, hear, feel?

[99] The Witness. Well, I was at the rear end of the car when all of a sudden the brakes went on and I was thrown. I was thrown clear through the car.

Q. How far? A. Well, I would say approximately 20 to 25 feet. I couldn't give the exact figure.

Q. Thrown to the floor, were you? A. That's right, yes.

Q. And as a result of that did you sustain some injury? I don't want you to tell us what but did you sustain some injury? A. Yes, I did, sir. When I came to I was on one of the side benches, that someone had put me on a side bench.

Q. Now just before this stop occurred d you remember where Mrs. Donnelly was? A. Well, as I was adjusting the lights Mary was at the counter to pick up trays, which was her duties to serve trays to the bench.

Q. She had been working on the way to Providence? A. She was. To my best knowledge, Mary was at the counter.

Q. Now after this event occurred did you observe Miss Donnelly in the car? A. No, not until after I was revived on the bench, then I saw Mary.

Q. And where was she then? [100] A. They were taking Mary over to the other bench.

Q. Did you observe Mrs. Steinfeld there at that time? A. Well, I didn't right at the moment, no; but I did see her until after I had come to, and when I got my bearings my first thought who was not hurt, who was badly hurt—that was my duty; but I knew she was hurt badly. She was deadheading to New York to do another job.

Q. How long previous to this time had you been in the employ of the railroad on this particular job? A. On this run, particular run?

Q. No. A. Oh, with the railroad. I was with the railroad since 1946.

Q. Doing this kind of work? A. Yes.

Q. So that prior to this event you had worked on this kind of work for some eight years? A. That is right, sir.

Q. Mostly on this particular run, Boston to New York, New York to Boston? A. Yes, that's right. Not those particular hours but on that run.

Q. And I suppose that during that eight years, Miss Driscoll, you had experienced a great number of train stops, had you not? A. Yes. But not sudden stops.

Mr. Deering. Well, I object. I ask it go out.

[101] The Court. That may go out.

Q. Do the brakes in your experience as a general thing make some sound when they are applied?

Mr. Deering. I object.

The Court. She may testify as to whether she has generally heard a sound when the brakes were applied? Have you heard them make a sound or not?

The Wi ness. I didn't hear—

The Court. No, generally.

The Witness. Generally speaking?

The Court. When brakes had been applied in the sense that you have been aware of when the train has been slowed down, have you heard a noise generally?

The Witness. Not a noise, sir; but I feel that you have—

The Court. All right, that's all you've been asked.

Q. Have you become aware as a general matter when a train stops in your experience,—do you become aware of that stopping in some way? A. Well, only through vibration, feeling the air going on the train for brakes; you feel a sudden vibration which you are quite used to, even approaching every stop you feel a certain vibration. You're acclimated to that.

Q. As the brakes are applied? A. Yes.

[102] Q. Generally, when brakes are applied when the train comes to a stop, are you made aware of it through some kind of vibration? A. Yes.

Q. Which occurs before the train finally comes to a stop? A. Yes.

Q. Now did anything of that kind happen in this particular case on October 11, 1954? A. No. No, it was a sudden stop.

The Court. Your testimony is, there was no vibration?

The Witness. No, sir, there—

The Court. Just a moment. You are being asked there was no vibration before this train came to a stop.

The Witness. Just a sudden stop.

The Court. No vibration, you're being asked.

The Witness. No. None that I remember of, your Honor. Just a sudden stop. Period.

Q. After you had been placed on a bench after this event occurred, Miss Driscoll, what happened thereafter?

Mr. Deering. I object.

The Court. Well, I don't know why she can't say what happened, anything she saw. Did you see anything?

The Witness. Did I see anything? No, sir. As I said, when I became myself to the best of my ability I checked over the crew to find out who was badly hurt. Then the next thing [103] I knew we were at the Providence station.

Q. You were taken off the train there? A. Yes, sir.

Q. Did you observe Mrs. Donnelly being taken off the train, too? A. Yes, we went together.

Q. After you were placed on the bench there after the stop had occurred, did you observe Miss Donnelly? A. Well, that's when I checked the crew, and Miss Donnelly was on the other side on the bench.

Q. What did you observe about her? A. Well, she was completely upset, as I was. I would say in a state of shock.

Q. Did she complain of pain? A. That's a thing I can't answer honestly. I was too upset myself.

Q. What was the condition of the car, the tables and the objects that were in the car? A. The floor was completely littered. Practically every object that was on the tables was on the floor. Broken glass. Everything on the floor.

Mr. Kelleher. Your witness, Mr. Deering.

The Court. Any questions?

Mr. Deering. Yes.

[104] *Cross-examination by Mr. Deering*

XQ. Now when this train came into the Providence Station, as it was coming in, just before the stop occurred, can you tell us what position you were in? A. I was at the extreme end of the car.

XQ. That is, you were at the extreme end of the car—
A. Yes.

XQ. —doing something, I think you told us, with the air? A. That's right. At the complete end of the grill car there are two booths.

XQ. That is located back near the door? A. That's right.

XQ. On the side? A. Yes, sir.

XQ. In other words, there's a passageway between where you were— A. No, back where I was standing was the complete end of the train. That was the end of the train that morning. We were on the rear end.

XQ. That is a place like a closet? A. Yes. It's on a wall panel.

XQ. A wall panel? A. That's correct.

XQ. Where the air conditioning was? A. Yes.

XQ. And that would be— [105] A. Just this side of the end of the car.

XQ. —opposite the corridor leading to the rear door; is that it? A. No, we were at the complete end of the train.

XQ. Isn't there a rear door on that— A. There's a rear door but we were on the complete end of the train.

XQ. I understand that. The door didn't lead anywhere except— A. No, except to the tracks.

XQ. Except to the tracks? A. That's right.

XQ. But there is a door there which permits passage through there provided you had another car attached? A. That's right, yes. I'm sorry.

XQ. So where you were was near that door, was it not? A. Right at that door.

XQ. Right at that door, the rear door? A. Yes, the end door.

XQ. And you were reaching up to these instruments which were on that wall panel? A. That's right. I was checking the air conditioning.

XQ. So I take it you were standing sideways to the direction in which the train was going; is that right? A. That's right.

XQ. Were you standing on your tiptoes? [106] A. No, because I can reach it without stretching.

XQ. Were you off balance in any way before the train stopped? A. No.

XQ. But you were standing up that way facing the panel? A. Yes.

XQ. And you went sideways; is that right? A. That's right.

XQ. And the last time you had seen Miss Donnelly she was down near the counter? A. Right at the counter, yes. That's the last I saw of her.

XQ. Having something to do with getting food? A. That's right.

XQ. And as far as you know, were you and Miss Donnelly the only people who were standing up in the car? A. We were the only ones then standing.

XQ. And as far as you know were you and Miss Donnelly the only ones who fell down in the car? A. Yes, to my knowledge. That's hearsay. I don't remember.

The Court. No, that's not hearsay. The question is what you know, not anyone else.

The Witness. I'm sorry.

The Court. Did you or did you not see anyone else except Miss Donnelly and yourself fall?

The Witness. I didn't see Miss Donnelly fall.

The Court. All right. So you don't know anything [107] except your own case; is that right?

The Witness. Well, I know—

The Court. Is that right? Were you the only one you observed?

The Witness. That's all.

The Court. Because I don't know and the jury doesn't know except what we are told. You know only what you observed, so far as the law is concerned. The rest depends on hearsay.

The Witness. Yes, your Honor. The two of us that were hurt.

XQ: As far as you know from checking your crew and making inquiry in the car, you and Miss Donnelly were the only two that were injured; is that right? A. Yes.

. . . . . .

TIMOTHY A. DONNELLY, *Sworn*

Direct Examination by Mr. Kelleher

Q. What is your full name, Mr. Donnelly? A. Timothy A. Donnelly.

Q. Where do you live? A. I live at 187 Hillside Street, Roxbury.

[108] Q. Are you the father of Mary Donnelly Henagan, the plaintiff in this case? A. That is right.

The Court. By the way, the papers don't show the married name, do they?

Mr. Kelleher. I believe not, your Honor.

Mr. Deering. I don't think so.

The Court. I think not. And at some appropriate time will you make an amendment.

Mr. Kelleher. All right.

Q. Do you remember when Mary Donnelly Henagan was born? Do you remember what date? A. I think it was 1913.

Mr. Kelleher. I have a certificate.

The Court. All right. It is agreed, I suppose, that she is about 45 years of age. Is that right?

The Witness. That's right.

Mr. Deering. I don't know. I have seen various ages.

The Court. Oh, all right.

Mr. Kelleher. I have a birth certificate if I can find it.

Mr. Deering. I am perfectly willing to agree she was 45, if that is agreeable.

The Court. All right.

Q. At some time your daughter went to work for the New Haven [109] Railroad, Mr. Donnelly. Do you remember about what time that was? A. It might have been '42 or '43.

Q. Had she worked for the railroad between 1942 or 1943 up until October 1954? A. Yes, sir.

Q. Prior to her marriage did she live with you and Mrs. Donnelly at your home? A. Yes, sir.

Q. Do you remember about when her marriage took place? A. '42, I think it was.

Q. You have other children? A. Yes, I've got three other children. Two boys and two girls.

Q. During the period from 1943 to 1954 did you have occasion to see your daughter frequently? A. Quite often, sir.

Q. Would you tell us about how often? A. Well, I see her pretty near every day.

Q. Did you have occasion to observe her health during that period of time? A. She was very—

Q. Just answer that Yes or No, Mr. Donnelly. A. Yes.

Q. Can you tell us in general about her health, physical condition? [110] A. She was in excellent health. She was a great swimmer—

. . . . . .

[120] Q. Your daughter was born, Mr. Donnelly, on August 20, 1913? A. Yes.

Q. Just before the recess I believe I had asked you—

The Court. What did you say? August 20—what?

Mr. Kelleher. 1913.

The Court. Right. Thank you.

Q. Just before the recess I believe I had asked you to describe your daughter's state of health during the years 1942 to 1954.

The Court. Well, you're really concerned with her state of health just before 1954, aren't you? We don't want to go into her salad days.

Mr. Kelleher. No.

Q. I believe you said her health was generally good during that period? [121] A. Yes.

Q. And you made some reference to her outdoor activities in which she took part. Will you describe them briefly? A. Well, she was a skater.

The Court. In 1954?

The Witness. No, she was not.

The Court. I really don't want to hear anything what she was doing like skating and swimming unless she was doing it within a few months of the accident. Was she doing any of that?

The Witness. She was handling the Little League.

The Court. The what?

The Witness. She was handling the Little League with the children around the Back Bay. She was very much interested in that. She was driving them to and from the playground. That was St. Cecelia's Church, Monsignor Phelan. And she became very active in the Youth movement.

The Court. This is all around 1954?

The Witness. Yes. Yes, your Honor.

The Court. Anything else?

The Witness. That's all I know, I think.

Q. So far as you observed her at that time she was an active, healthy person? A. Yes, sir.

Q. Now at some time you were notified, were you, that an [122] accident had occurred in Providence in which your daughter was involved? A. Yes, sir.

Q. Do you remember how you got that notification, and when, approximately? A. I think it was around, it might have been 8 o'clock or 8.30 in the morning.

Q. On October 11th? A. I don't remember the date, sir.

Q. But it was the day of the accident? A. Yes, sir.

Q. How were you notified? A. By telephone.

Q. And as a result of that notification did you do something? A. Yes, sir.

Q. Will you describe briefly what happened from then on? A. I was notified by telephone from Rhode Island. I don't know whether it was the New Haven Railroad or the doctor.

Q. Please keep your voice up, Mr. Donnelly. A. And—that my daughter was in an accident, a railroad accident. Well, they said she was coming back by train—

The Court. No, I think you better not tell us of the circumstances, if they described them, on the accident, but you may tell anything they told you about meeting her or something like that.

[123] The Witness. Yes, your Honor. I met her at the Back Bay station.

The Court. Did they tell you to meet her?

The Witness. Yes, they told me to meet her at the Back Bay Station. I met her at the Back Bay Station, and I jumped into the train after it stopped, and the mother was on the platform, and my son.

Q. Your mother? Her mother? A. Her mother, yes, my wife. And I went in. She was just as rigid as a piece of board. I grabbed her. She had a plastic collar around her neck. And I said, "What happened, what happened,

what happened?'' She wouldn't answer me. Then she said— So the mother and I took her out on the platform, and I kind of held on to her because we took her up in the elevator from the lower level.

Q. Keep your voice up because I can't hear you. A. We took her from the lower level up on the elevator, and she— we worked her into the car and brought her to the Brigham Hospital where she was in the emergency ward for nine hours.

The Court. Well, now, I think you better be very careful to tell only what you observed. I assume you stayed at the hospital.

The Witness. Yes, I did; I did, your Honor.

The Court. All right.

[124] The Witness. All day and all night. I then went upstairs after they got through with her downstairs, and they put her in traction, I think it is.

Q. Traction? A. Yes. And she was in a ward, and she was all tied up. I sat alongside the bed, and so did my wife. My wife at the time was not feeling too good, and so I asked my son to take my wife home, that I would stay there. So then I seen Dr. Sturgis, and Dr. Sturgis—

Q. No, don't tell us what any of those people said. A. No.

Q. Did she recognize you when you met her at the Back Bay Station? A. She never spoke to me, never said a word—only I just took her from the car, very slowly down the steps and put her into the other car with some difficulty.

Q. At some later time did she recognize you? A. About —the next day, after they had given her medication, she said—I said, ''Mary, how did''—

Q. No.

Mr. Deering. I will object to conversation.

Q. Did she recognize you? A. Yes, she did.

Q. At the time when you met her at the Back Bay Station did she complain of pain? [125] A. She didn't say a word.

Q. She was in the hospital for some days after you took her there October 11th? A. Yes, sir.

Q. Will you tell us approximately how long? A. Oh, I don't know. Perhaps three weeks, two or three weeks.

Q. Did you visit her? A. Every day.

Q. And at the end of three weeks did she come back then to your home? A. They sent her out of there with a Thomas collar which—

The Court. No, please, just a moment. Did she come back to your home?

The Witness. Yes.

The Court. At the end of three weeks?

The Witness. Yes, your Honor.

Q. Where did your daughter and her husband live shortly prior to the accident? A. They lived on Huntington Avenue.

Q. Is that fairly near your place? A. Yes, very near.

Q. After she came home from the hospital on this first occasion she then was at your home for some time? A. Yes.

Q. Can you tell us in your own words what you observed about [126] her condition when she first came to your home after leaving the hospital? A. Well, about, I would say about four weeks after she came from the hospital she became very nervous, fidgety, and said to me, "Papa, they're not going to put me in jail." I said—

Mr. Deering. I object to this.

The Court. Well, this is quite relevant, state of mind of the plaintiff after the accident; that is relevant to pain and suffering.

Q. Will you continue, Mr. Donnelly, with the answer?

The Court. You were saying that your daughter said she was afraid she would be put in jail or something.

The Witness. Yes, your Honor.

Q. Did she talk about the accident of October 11th? A. Well, she said that the railroad was trying to blame her for the— [Witness unable to proceed.]

Q. I understand this is difficult, Mr. Donnelly, but you must understand that the jury must be told—

The Court. All right. Then you put the questions, please, and don't do anything else.

Q. You did discuss with her at that time and at later times the accident which happened on October 11, 1954? A. I did discuss it with her, yes, sir.

Q. On how many occasions or how often would you discuss the matter? [127] A. Well, later on she didn't want to hear about it at all because of the fact I wanted to keep it away from her and because she continually—

The Court. Just a moment. The question is, how often did you discuss it with her?

The Witness. Not too often. I just don't remember, your Honor.

The Court. Well, we don't understand what "Not too often" means. Eight times, ten times—or what does it mean?

The Witness. Well, perhaps half a dozen times.

Q. You mean half a dozen times over the next two or three years? A. Well, only what the railroad discussed with her.

The Court. No, no, no. Please! I know you're not used to being a witness,—at least, I assume you are not.

The Witness. No, sir.

The Court. But would you please, Mr. Donnelly, tell us how often you yourself over a period of years talked with your daughter about the situation.

The Witness. Well, the only time that I did bring it up was when we had to.

The Court. No, please. Just count on Mr. Kelleher's ability to bring out everything that is relevant and answer the question as to how many times.

The Witness. I don't think I discussed it more than [128] a dozen times with her, your Honor.

Q. And on that dozen or so occasions, Mr. Donnelly, you and she talked about what happened on October 11, 1954? That can be answered Yes or No. A. Yes.

Q. Did she start these conversations or did you? A. She started the conversations.

Q. Can you describe for us briefly what occurred on those occasions? What did she say?

Mr. Deering. I object to what she said.

The Court. She isn't under these circumstances presumably reciting the truth of the matter. In fact, the very problem is whether she had at that time such a distorted mind that she had pain and suffering. This conversation isn't offered to prove the truth of the matter; it is offered to show the state of mind. Isn't that right?

Mr. Kelleher. Exactly.

The Court. And is admissible.

Q. What did she say? A. She, when she did talk about the railroad she said, "I'm not responsible. Are they going to hold me responsible for the death of the woman?"

Well, I tried to be a little reasonable at first. I got nowhere. Then I became a little mercenary, so I coaxed her and still she would continue to say that. We had to watch [129] her. She would get up in the middle of the night and put on the kettle. My wife and I—my wife would nudge me and say, "Mary is up, Pa." I would jump out of bed, I'd go out, the gas would be on and in one instance burned the bottom out of the kettle. Turned the gas off and went in

the room, and she's walking up and down the room, pacing up and down the room, and she said to me, "I'm going to get rid of this. I'm not responsible for this. I'm going to jump. I'm going to jump over the Charles River. I'm not responsible."

Many nights I walked the streets with her. One night I was walking down the street and a police officer came. She accused me then of trying to turn her over to the police.

Q. Did you observe that she had feelings of hostility toward you and others at other times during this period? A. Oh, yes.

Q. Let me ask you this, Mr. Donnelly. Your daughter was married sometime in 1943? A. Yes, sir.

Q. Married to George Henagan? Is that the name? A. Aubrey S. Henagan.

Q. And did you observe—well, she has a son who is now about sixteen years old; is that correct? A. Yes, sir.

Q. Prior to this accident, and let us confine us to the period—

The Court. Excuse me. I don't think you mean that [130] question exactly as you phrased it because a wrong implication might be drawn. Is your grandson sixteen years of age?

The Witness. Yes.

Q. At this present time, not at the time of the accident? A. Yes, sir.

The Court. Well,—

Mr. Kelleher. Now I think I see.

Q. Your daughter was married sometime in the early part of 1942; isn't that right? A. Approximately, yes.

Q. And your grandson was born, I think it was, November 20, 1942? A. Yes, sir.

Q. Did you observe, did you see your daughter and her husband quite frequently during the two years preceding 1954? A. I see my daughter. He was in the Service.

Q. Oh, I'm talking now about 1952, 1953. A. Oh, yes, yes.

Q. They lived together on Huntington Avenue? A. She stayed most of the time in my house.

Q. And did you observe the relationships between your daughter and her husband? A. Very happy. Until the accident.

Q. Did you have occasion to observe her conduct, her relationships with her husband? [131] A. Well,—

Q. Did you, Yes or No? A. Yes.

Q. After the accident? A. Yes.

Q. You did? A. Yes.

Q. On frequent occasions? A. Yes, sir.

Q. Will you describe those relationships with him after the accident? A. Well, she became more or less hostile to him.

Q. Did you observe her relations with her son after the accident? A. The same thing existed there.

Mr. Kelleher. Your witness, Mr. Deering.

Cross-examination by Mr. Deering

XQ. Where was your daughter living at the time this accident happened? A. She was living at my home.

XQ. At your home? A. Yes, sir.

XQ. How long had she been living at your home? A. Oh, all during the time. He had been in the Service— [132] The Court. Well, will you please answer in months or years previous to October 11, 1954, for how long your daughter had been living in your home, Mr. Donnelly?

The Witness. Oh, no, she was living with her husband.

XQ. With her husband? A. Yes, sir.

XQ. On Huntington Avenue? A. Yes, sir.

XQ. What address on Huntington Avenue? A. 162 Huntington Avenue.

XQ. Did you ever live at that address? A. No, sir.

XQ. She and her husband lived there? A. Yes, sir. And her son.

XQ. And how soon after the accident happened did she come to your home? A. After she came out of the hospital.

XQ. And she went to work for the railroad in 1943. Where was she living at that time? A. She was living at my home.

The Court. In 1943?

The Witness. Yes, sir.

XQ. She was living at your home at that time? A. Yes, sir.

XQ. Was she married at that time? [133] A. He was in the Service.

XQ. Oh, he was in the Service in 1943? A. Yes.

XQ. How long was she living at your home after that? A. Well, until after he came out of the Service.

The Court. Please be a little more specific if you can as to the month.

The Witness. I think it was 1944 to 1947.

XQ. Then she went to live on Huntington Avenue? A. Yes, sir.

XQ. Had she ever lived on Huntington Avenue before that? A. I don't know, sir. I don't think so.

XQ. And following the time of the accident you say she returned to your home? A. Yes, sir.

XQ. Did she stay there all the time? A. Mostly all of the time.

XQ. Did her husband live there in your home, too? A. No, he lived down on Huntington Avenue at 162, and I lived on Belvidere Street opposite St. Cecelia's Church.

XQ. And did the husband continue to live there up to the present time? A. Yes, sir.

XQ. And has your daughter continued to live in your

home up to the present time? [134] A. Sometimes I take her down, sometimes I take her home.

XQ. And where does the child live? A. He lives with both the father and I. He goes to school from my home. The father has a night job and just can't take care of his son.

XQ. Has she ever lived with her husband following this accident? A. No, sir.

XQ. Were there any times prior to the accident she hadn't lived with her husband except when he was in the Service? A. No, sir.

XQ. Did you say that she was living with you right up to the time the accident happened? A. Yes, sir.

XQ. Now at the time the accident happened where were you when you got the telephone call? A. I was at home.

XQ. You went down and met her at the train? A. Yes, sir, with my wife and my son.

XQ. You had no conversation with her at that time? A. No, sir.

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[135] AUBREY S. HENAGAN, *Sworn*

Direct Examination by Mr. Kelleher

Q. What is your full name, Mr. Henagan? A. Aubrey Stingley Henagan.

Q. How do you spell the last name? A. H-e-n-a-g-a-n.

Q. Will you please keep your voice up, Mr. Henagan? A. Yes, sir.

Q. Where do you live? A. 162 Huntington Avenue, Boston.

Q. What is your occupation? A. Stationary Engineer.

Q. Is that the kind of engineer who has charge of power plants? A. Yes, sir. Steam engineer, power plant engineer.

Q. You were married to Mary Donnelly sometime in 1943?

The Court. '2.

A. 1942.

Q. 1942. I'm sorry. Do you remember the date? A. February 28, 1942.

Q. And were you in the Service at that time? A. Yes, sir.

Q. What branch? [136] A. United States Coast Guard.

Q. And during the next three or four years were you away on duty for the most part? A. Well, the biggest part of the time, yes, sir.

Q. And that was in the Atlantic and Pacific both? A. Yes, sir.

Q. Your son was born sometime in 1943? A. 1942.

Q. 1942, yes. A. November 28, 1942.

Q. Well, during the first three or four years of your marriage were you able to establish your home? A. Well, not really a permanent home. I was mostly back home on leave a few times and at times I would have—we did have a home in Gloucester, a very short time.

Q. When did you finally leave the Service, Mr. Henagan? A. June, 1946.

Q. And at that time did you and your wife establish a home? A. Yes, sir.

Q. And did you live with your wife from that time until October 11, 1954? A. Yes, sir.

Q. Were you happily married? A. Yes, sir.

Q. Can you tell us in general about the state of your wife's [137] health from the year prior to October 11, 1954? A. Her health was very good.

Q. Was she active? A. Very active.

Q. Did she have something to do with the Little League?

A. Yes, sir. She was active in the Little League in sports for the children of St. Cecelia's Church. She would go with them and drive them to different places where they would play ball.

The Court. You are talking against the wind, Mr. Henagan. You're talking against the wind, just as I am, and you will have to talk louder.

The Witness. Thank you, sir.

A. [resuming]. She was very active in the Little League with St. Cecelia's Church, with the young children, bringing them to the places where they would play ball, and various things having to do with the welfare of the children, as she had a son of her own.

Q. When did you first hear of the accident on October 11, 1954? A. Well, I believe my father-in-law called me. I don't remember exactly the time but it was shortly he heard of the accident. I don't remember the exact time that he called me.

Q. Did you see your wife on that day? A. I saw her at the hospital, Peter Bent Brigham Hospital.

[138] Q. She was confined to the hospital at that time for a period of two or three weeks? A. Yes, sir.

Q. You were then living where? A. I was living at 162 Huntington Avenue.

Q. What did you observe with respect to her condition when you first saw her after the accident? A. Well, I met them at the hospital, and she had a temporary cast on her neck, and she seemed in shock for days. Sometimes she didn't seem to recognize me at all.

Q. Did you see her the next day? A. Yes, sir.

Q. Did she recognize you at that time? A. No, sir. She was in traction, and she was like—she seemed to be in very much pain.

The Court. No, just answer the question. She didn't recognize you?

The Witness. No, sir.

Q. At some later time she did recognize you? A. I think it was the following day after, the second day after.

Q. The second day after the accident. Did you have any talk with her at that time about her condition? Yes or No.

A. No.

Q. At some later period of time did you have any talk with [139] her about her condition? A. Well,—yes, sir.

Q. Can you tell us when the first such talk occurred, approximately? A. Well, I talked with her during—

The Court. No When, please?

The question was when such talks occurred. That requires a date, nothing else.

Q. Approximately? A. Approximately three or four days after the accident.

Q. Did she complain of pain? A. Yes, sir.

Q. Did you talk with her about the circumstances of the accident at that time? A. No, sir, I don't think I talked about—

The Court. I can hardly hear you with the wind.

The Witness. No, sir.

Q. Has there been a change in her attitude and feelings toward you since October 11, 1954? A. Yes, sir.

Q. And will you describe to the jury her attitude toward you since that accident? A. Well, since the accident she seems to be a completely changed person as to how I knew her before the accident. She got very moody, and she seems to want to talk about the accident [140] and the poor woman that was hurt, and she seems to gather the idea that she was somehow responsible for the woman that was hurt in the accident. As time went by she seemed to feel more strongly she was responsible for the accident or in some way responsible for the woman's death, and she began to assume the idea that the railroad was trying to prosecute her for the accident, and at times she would cry a lot and

feel very depressed, feel as though she was responsible, and when I would try to cheer her up she would try to shy away from me and as she got worse she even became frightened of me.

Q. Have you had a conversation at some time with her in which the word "engineer" was used in connection with you, Mr. Henagan? A. Yes, sir. She has—

Mr. Deering. I object.

The Court. Well, this is quite relevant. It is not, I hope the jury realizes, anything more than an attempt to show what the state of mind of the plaintiff is. Now of course as Mr. Kelleher emphasized in his opening, it is a part of his business to show the state of mind that the plaintiff has is causally related to a breach of duty on the part of the railroad. I am not saying and I don't ever attempt to say there was a breach of duty on the part of the railroad, and I am not saying I do not ever intend to say there was any causal relation between what happened in Providence and what is the [141] present state of mind of the plaintiff, and what has been the intervening state of mind. Those are jury questions. All I am doing is ruling that as a matter of law you are entitled to hear the evidence and it is for you to make up your minds, not for me to make up my mind.

Mr. Kelleher. Would you read that question back to Mr. Henagan?

[The following question is read:

"Q Have you had a conversation at some time with her in which the word 'engineer' was used in connection with you, Mr. Henagan?"]

A. Yes, sir.

Q. Will you tell us what that conversation was? A. She accused me of being an engineer with the railroad. She's so confused that she thinks I'm an engineer with the railroad. She's so states that fact that I am engineer and

thinks that I'm working with the railroad trying to bring her to state of prosecution for the death of the woman.

Q. Can you tell us approximately when that conversation occurred? A. Well, this started about a year ago, and since then she has been very frightened of me and there has been very little bit I can do to help her since that time.

Q. Have you observed her relationships with her son since this accident? [142] A. Well, her relationship with her son has changed drastically. At times she will just sit and stare at him. At times she will—if he gets a little loud at things, gets on her nerves, or anything, she'll start shouting at him—how can he act that way when she is responsible for the poor woman's death, and the poor child is all confused. He doesn't know what's the matter with his mother. At other times—

The Court. Well, you might not tell us about his reactions to her. You can tell about her state of mind. As to his state of mind he will have to tell us if Mr. Kelleher believes it to be relevant at all.

Mr. Kelleher. He will not be called as a witness, your Honor.

The Court. All right. Don't tell us about his state of mind. You can tell us about your wife's state of mind because she is the plaintiff in the case and her state of mind is relevant.

The Witness. Thank you.

Well, as far as I can say—I hardly know how to phrase it. The state of my son's reaction is hard for me to phrase.

The Court. Well, speak of it in terms of what you observed about your wife, not what you observed about your son. For example,—and I am not suggesting this is the case,—if your wife is short tempered with your son you can tell us that.

[143] The Witness. Well, she has become very short tempered with him, and she has changed completely from what

I thought was a perfect mother to where she isn't too good for the child. I mean, as briefly as I could put it, I don't know whether that is what you would like to hear.

The Court. We don't like to hear anything but we have to be told.

Mr. Deering. I ask that the entire answer go out, your Honor.

The Court. Oh, no. That motion is denied. It is very difficult for anybody to describe under the best of circumstances and it is extremely difficult under these circumstances.

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[149] *Deposition of* JOHN HENRY SMITH

[The questions in this deposition are read by Mr. Kelleher and the answers by James R. DeGiacomo, Esq.]

"Q Would you please state your full name? A My full name is John Henry Smith.

Q And your address? A 357 West 115th Street, Apartment 22, New York City.

Q Where are you employed, Mr. Smith? A By the New Haven Railroad.

Q And in what capacity are you employed? [150] A I am employed as a counter man.

Q Were you so employed on Monday, October 11, 1954? A Yes.

Q Do you recall any unusual event transpiring on that day—anything unusual happening on that day? A Not to my—

Q I will repeat the question again. On October 11, 1954 at 8 a.m. in the morning, were you on duty that day? A I was on duty.

Q And do you recall where you were at that time? A Yes.

Q And where were you, Mr. Smith? A. Coming into Providence.

Q Now, I ask you again, do you recall any unusual events transpiring about that time—anything unusual coming into Providence? A Yes.

Q Would you explain what unusual event took place as you came into Providence? A Well, what happened, the train made a very fast stop.

[151] Q And where were you at the time of this very fast stop? A I was in the kitchen where I work.

Q Do you recall what you were doing? A I don't recall now.

Q Would you describe for us this very fast stop?"

Mr. Deering. I object.

The Court. Well, I allow that. Go ahead.

Mr. Kelleher. I will rephrase the question.

"Q Do you recall your position just prior to the stop? Were you standing or sitting? A I was standing.

Q Do you recall your position during the stop? A Well, when this train stopped it just caught me this way and I just held to the side of the car.

Q In other words, you were thrown against the side of the car?"

Mr. Deering. I object.

The Court. That may be answered. It has to do with the force of the stop.

Mr. Kelleher [reading]:

"Q Would you explain just what you mean when you say you just held—the train held you?"

[152] Mr. Deering. Then I said, "I don't think he said that."

The Court. I think he didn't either. Unless you think there is something very important about these objections, I think it is silly and trivial to repeat them.

Mr. Kelleher [reading]:

"Q Would you explain what you mean by held to the side of the car? A Well, what I mean by that is the way the train was going I would be standing over here and the train was going this way and I held like this [indicating].

Q Did you fall? A I did not fall.

"Q Did you observe the conditions of the kitchen just after the stop? A Well, it was in bad shape.

Q Would you explain what you mean by 'bad shape', please? A Well, we had dishes all over the floor—glasses—and we had a few pans that went on the floor.

Q Did you do any cooking after the accident? A About two hours I did some cooking. That was around New London—past New London.

[153] Q About two hours later? A Almost two hours—I don't recall just how long.

Q Would you tell us the reason why you were unable to cook for two hours? A Well, it wasn't prepared.

Q It wasn't prepared? A I mean the kitchen wasn't in no shape. I had to clean up the dishes and get it straightened out.

Q How long have you been employed on the rail road, Mr. Smith? A Twenty-six years.

Q After the accident did you observe the plaintiff in this action, Mary Donnelly? Did you see her? A After the accident?

Q Yes. A The only time I saw her was when I went to the side of the car—went to the side door and

I saw her outside on the platform in some kind of a chair. I don't think it was a chair either but she was in something lying down.

Q. Mr. Smith, you stated it was two hours before you were able to serve anything again. [154] Do you recall what it was you did serve at the end of the two hours?"

The question is not answered.
That is all.

. . . . . .

Mr. Kelleher. I call to the jury's attention the fact that these pages of the record work in reverse. The earlier ones are on the bottom on the right-hand side. I should like to read these parts of the record. It has some kind of a rubber stamp heading. The date is 10/11/54.

"Time of Arrival: 12.40 p.m. MARY DONNELLY. 10/11/54. This 35-year old railway attendant allegedly injured her neck when train stopped [155] suddenly about 8 a.m. today in Providence. She was in some room and, according to her friend who was with her, twisted her head inwardly at time of sudden stop. There was no apparent fall and according to witness she did not strike anything. Patient herself was too upset and hysterical to give a coherent story. All she could say was the head felt like she would like to get rid of it. She did complain of left shoulder pain and tended to use this arm less than right. Young woman obviously very upset and frightened."

Then there is a note of some kind of medication.

"A plaster Thomas collar is around neck. Patient tends to hold head erect and complains of pain down both shoulders on left more than right.

Reflexes present and equal in both arms. Left arm motion limited by shoulder pain. Chest, heart and abdomen not examined since patient was uncomfortable lying down."

Then occurs a sheet dated October 11, 1954. It is a form which calls for a statement of the patient's troubles. In the line below are those words:

"Info refused by patient."

There are some words following that. I suppose that means [156] information refused by plaintiff.

Another sheet not filled out where the words occur, "Physical not allowed by patient." Those same words occur on the next, the following sheet.

On a third sheet it calls for information, a form to be filled out, and there occur the words, "History and Physical not obtainable from patient."

There is one sheet which says, "This is the first P.B.B. admission of this 35-year old white female New Haven Railroad attendant. Pain in neck and left shoulder for one hour. Patient was working on this day and train made emergency stop at Providence at 9 a.m. this morning. Was standing up in grill car and tossed about by the stop, twisting her neck. Details of the accident are not obtainable. Patient noticed immediate pain down back of head between shoulders, inability to move head or back because of pain. Later in the day patient developed pain in the left shoulder with less motion of left shoulder. She has spent the afternoon in the O.P.D. and has been sedated heavily because of hysterical reaction. History is somewhat vague."

. . . . . .

[158] DR. SHEPARD GINANDES, *Sworn*

Direct Examination by Mr. Kelleher

Q. What is your name, Doctor? A. Shepard Ginandes.

Q. Doctor, you will have to speak louder. Where do you live, sir? A. In Lexington.

A Juror. I can't hear.

The Witness. In Lexington, Massachusetts.

Q. What is it? A. I'm a resident of Lexington, Mass.

Q. The street and number? A. Yes. No. 7 Trotting Horse Drive, Lexington, Massachusetts.

Q. What is your occupation? A. I am a psychiatrist.

Q. And where is your office? A. At 270 Commonwealth Avenue in Boston.

Q. Are you associated in some way with some governmental body? [159] A. Yes, I am the Director of the Psychiatric Clinic at present in the Cambridge District Court, known as the Cambridge Court Clinic.

Q. Can you tell us something about your education, Doctor? A. I'm a graduate of Harvard College and Harvard Medical School; interned at the Massachusetts General Hospital and had a residency in psychiatry at the Boston Psychopathic Hospital, and had two years' staff position as an Army psychiatrist and subsequently working now for the Cambridge Court Clinic. That is my training.

Q. When did you get your M.D. from the Harvard Medical School? A. 1951.

Q. And have you practiced in this field since that time? A. I have.

Q. Do you wish to tell us anything further about your professional qualifications, membership in societies, or anything of that sort? A. One additional affiliation is with the Boston Psychoanalytic Institute.

Q. And your work has been devoted entirely to this field of psychiatry since 1951? A. I will qualify that. Until

1952 I was interning and specializing in that at the time. That was with children primarily, M.G.H.

Q. Where? [160] A. At the Massachusetts General Hospital. But from 1952 until the present I have been exclusively in psychiatry.

Q. Will you tell us in general what that field deals with, Doctor? A. It's a big question. Psychiatry deals with emotional and mental disorders of all kinds, both affiliated with organic diseases or injuries, and not affiliated with same.

Q. It involves both diagnosis and treatment, does it? A. That is correct.

Q. By diagnosis you mean the ascertaining of the nature of a disorder, or can you give us a better definition? A. Well, as with any physician, when one sees a patient one makes a first effort to understand as best you can what situation or situations has brought this patient into the illness that you see him in. Sometimes it's easy to figure out, sometimes it's not.

Q. At some time at my request did you make an examination of Mary Donnelly Henagan, the plaintiff in this case? A. I did.

Q. Can you give us the date of the first examination? A. I first saw Mrs. Henagan, examined her, on August 4, 1958.

Q. And have you examined her on subsequent occasions? A. I have.

Q. Will you give us the dates of those examinations? A. On August 7, 1958, and September 3, 1958; then once again [161] on December 10, 1958.

Q. So you have examined her on four occasions? A. That is correct.

Q. And can you tell us in a general way the nature of the examination you made on those days? A. I inter-

viewed Mrs. Henagan on each of those occasions. On all occasions where she was willing to stay with me for an hour, I interviewed her for that length of time. However, her disturbance was sufficient so that on the last occasion when she came she was unwilling to speak with me for more than 15 or 20 minutes. There was no physical examination performed by me during this time. I was not accustomed to perform that as a psychiatrist. However, I checked her medical record to inform myself about her physical condition, and I understood from the record that she had difficuty in allowing any physical examination to be performed previously. That may be digression.

I also interviewed her father and her husband in an attempt to find out something of what his wife was like before her illness began.

Q. Have you examined her hospital record at the Peter Bent Brigham Hospital since October 11, 1954? A. Yes, I have. I examined the entire hospital record.

Q. And in arriving at your conclusion you have taken that into account as well? A. I have. And also I have communicated with Dr. Bojar and [162] Dr. Banks, who were two physicians very much involved in her case since 1954.

Q. Based on your examination of Mrs. Henagan, Doctor, and on the other material you have just referred to, have you reached your opinion as to her present condition? A. I have.

Q. Will you state that opinion? A. I believe that at present Mrs. Henagan is suffering from a paranoid psychosis. This means that she is unduly suspicious, she has some deeply rooted beliefs which do not correspond to reality and which make her behave in ways which are often bizarre and unusual. I also believe that because of this psychosis she is not mentally competent at this time to handle her own affairs.

Q. Is she in your opinion capable of carrying out any employment at this time, working in the way she has worked? A. I don't believe she can work.

Q. You have seen her now over a period of, well, from August to December. Has there been any change in her condition from August to December as you have observed it? A. She has not gotten any better, and it is my suspicion that she has gotten somewhat worse but I can't say that for sure because the last time I saw her was in close proximity to the time when her mother passed away and there was a certain amount of grief reaction which would have obscured the picture a little, [163] but the picture was not significantly different at that time than it was previously. She was still concerned with the same delusional beliefs as she had when I first saw her in August.

Q. Will you describe those beliefs as you have observed them in your interviews? A. Mrs. Henagan at varying times in my contact with her would tell me pieces of these ideas. She was never willing to state them very clearly, and when she would refer to them at all she would sometimes get overcome with feeling and become very frightened as though she expected to be punished and retaliated against. But her belief, which I understand from Dr. Bojar began back in 1954 or '5, was that she herself was personally responsible for the death of the woman who fell or jumped in front of the train on which she worked in 1954, just as though she were herself a murderer, and that this whole proceeding in this court, which at the time I saw her was in the future, was going to be a murder trial at which she herself was to be the defendant. And she also further believed that I worked for the railroad and that everybody else concerned in the case had some involvement with the railroad, and that an attempt was being made to coerce information from her about the case. Actually, what she is

afraid of is that we are all trying to make her confess to murder.

Now this belief persisted despite my repeated assurances to her that I know she is concerned with this woman's [164] death but that I nor anybody else would not hold her personally responsible. At the time when I stated it just about the way I stated it now she took my statement as an accusation, despite the fact that I repeated that nobody to my knowledge holds her responsible for this event.

On the last occasion when I saw her she expressed a feeling about her mother passing away, which I think is quite bizarre and is quite typical of some of the unreasonable psychotic effects of her disease. She said that at least now her mother's lips are sealed and no secrets can be obtained from her mother relative to the accident, to the incident in 1954. I felt this was the kind of utterance which one sees in mentally incompetent people who are under severe psychotic disturbance.

Q. In connection with these examinations, Doctor, did I request you to consider and to advise me whether this woman could be brought into a court room in this case for the purpose of testifying? A. You did.

Q. And did you advise me about that matter? A. I advised you to avoid having her in the court room; and I also said that if she were in the court room I would not be willing to testify because of the potential disturbance to her of the material that I would be revealing to you.

Q. Did I ask you also in connection with the examinations [165] to consider the possibility of treating this woman and to consider what treatment might be given to her and what possible results would come from the treatment in the future? A. You did.

Q. Have you considered that matter? A. I have.

Q. Do you have an opinion as to what might be done for her, if anything? A. I feel that—

Q. Yes or No to that, please. A. Oh, yes, I do.

Q. Will you state your opinion? A. As I expressed it to you, my feeling is, that here is a woman who is at present severely disturbed and who has not responded to competent expert out-patient treatment during the period that she saw Dr. Bojar. Dr. Bojar is a colleague of mine. I know his work. I have high respect in him. And I feel that a patient who continues to get worse while seeing him probably is suffering from a serious condition. I took that into consideration in my feeling I doubt if this woman would respond to once a week or twice a week or three times a week interviews with a psychiatrist while living in the community. Her response of seeing me was quite severe. I don't think she got any benefit from it in the way of support or confidence. She would be very difficult to treat. [166] I felt that the only hope I could see for her, in my opinion, would be hospitalization with interview type psychotherapy, as we call it, psychotherapy treatment going along with hospitalization, that is, interview with psychiatrists, hoping she can make a good relationship with someone perhaps four or five times a week during her hospitalization, having the benefit of whatever shock or drug treatment might seem indicated to the hospital authorities. I believe in her best interests she ought to be committed to a hospital, so the treatment can take as long as it is deemed necessary.

Q. Do you have an opinion as to whether treatment of that kind if continued over whatever period of time might be necessary would in time produce obvious results? A. This would only be a statement of my judgment in the matter. I could not predict, of course, with certainty but I would have serious doubt whether even this treatment would be of much help to her. Her course has been downhill all the way, I believe, since 1954, as I understand it and as I have seen it in her.

Q. The treatment you speak of, Doctor, would involve residence of some kind in a hospital? A. Yes.

Q. Based on your knowledge in this field, your experience in this field, are you able to tell us what a fair charge for such residence would be?

[167] Mr. Deering. I object.

The Court. Overruled.

A. There are relatively few institutions in this country that can provide—

The Court. No, no, that's not the question. The question is, what would be a fair charge.

Mr. Kelleher. No, can you tell us.

The Court. Or can you tell us. Maybe you can't tell us.

A. Well, what at least one such institution charges—

Q. What is that institution? A. The Chestnut Lodge, it is called, in Maryland.

The Court. Is that the only experience, with one such institution?

The Witness. Well, your Honor, there are very few institutions that provide daily psychiatric and intensive interviews with patients as well as hospitalization.

The Court. Well, if you only know about one such institution I will sustain the objection on the ground you are not an expert with respect to this, but I rather guess you know more than one, don't you?

The Witness. I know of more than one but not with the same accuracy.

The Court. You are not being asked what it would cost to live in the best and most fashionable. You are being asked [168] or going to be asked, what is the fair and reasonable charge for the kind of hospitalization which this plaintiff is going to have to have in your view? Have you had a sufficient background of experience to know about a number of such institutions?

The Witness. Yes. Charges in mental hospitals such as you speak of would run at least $20 to $30 a day, plus treatment charges.

Q. And do you have an opinion as to what the fair charge for the necessary treatment would be? A. Probably $20 per hour interview with a psychiatrist and, if shock treatment were ordered, probably $25 for that treatment.

Q. You speak of the patient having interviews. In your view how many such interviews would be necessary? A. Four to five.

The Court. I don't quite understand with respect to the shock treatment. Has the plaintiff had shock treatments so far?

The Witness. No.

The Court. Is there any reason to suppose the plaintiff ought to have shock treatment?

The Witness. Yes, I think it is quite reasonable to guess that at some future time she may have to have it.

The Court. I am not talking about guessing. Have you prescribed it?

[169] The Witness. Not for her.

The Court. Then I don't think the testimony with respect to shock treatment is in order.

Mr. Kelleher. Very well. It may go out, your Honor.

Q. Your testimony, however, is that the charge per day would be $20 or $25 per day? A. That is right.

Q. And five interviews a week would be necessary? A. Yes, four or five.

The Court. Excuse me. Four or five. How long?

The Witness. An hour long interview.

The Court. Yes, for how long a period of time?

Mr. Kelleher. I haven't come to that.

The Court. Oh, all right. I wasn't sure about that question.

Q. While it is going on and she would need four or five of those per week, and the fair charge, as I anderstand it, would be $20? A. That is right.

The Court. There's one thing I'm very confused about. This woman was in this accident on October 11, 1954. How long has she been your patient?

The Witness. Since August of this past year.

The Court. August 1958?

The Witness. That is correct.

[170] The Court: During the period from August, 1958 to January 7, 1959, had you ever prescribed this kind of four or five times a week of psychiatric treatment?

The Witness. No, sir. I was—if I can amplify that, your Honor—I was asked to examine her for an opinion as to her condition. I was not asked to treat her, nor was she willing to be treated. She was willing to come to my office and answer some of my questions.

The Court. Well, is there any reason to believe she's willing to be treated now?

The Witness. No, sir. This is why I suggested—

The Court. No. This is a question of law. It is only if the patient is willing to undergo an operation, that the testimony of an operation is ever relevant; it is only if the patient is willing to undergo psychiatric treatment that the value or the cost of it is relevant. Now there is no showing here that the plaintiff is willing. It might often be the case that the plaintiff with a physical injury would be better off with an operation but if she isn't willing to be operated on, then the cost of it is irrelevant. It might be this plaintiff would be better off with psychiatric treatment but if there is no showing the plaintiff wants it, then the jury is to disregard entirely the cost of such treatment. There is no evidence whatsoever of willingness on the part of the plaintiff but at this stage the evidence is to the [171] contrary.

Q. The plaintiff did come to see you, Doctor, on more occasions? A. That is correct.

Q. Is it your belief that she could be brought to a set of treatments on a future occasion? A. I believe she could.

Q. Is there any question but what she could be committed to an institution?

Mr. Deering. I object.

The Court. Well, I don't know what committed means. If it means to a state institution, that's one thing, in which event there would seem to be no cost necessarily incident to it.

The Witness. Your Honor, may I--

The Court. No, you may not. Just count on Mr. Kelleher, who is really quite used to talking, and you ought to listen.

The Witness. Fine.

Q. This woman is insane, in your opinion?

Mr. Deering. I object.

The Court. Well, that's a wonderfully difficult question for me to rule on, and I think perhaps you better not put the question in that form. I will allow the doctor to discuss the mental condition but the word insane is just so full of complexities for lawyers and judges—

Mr. Kelleher. May I see your Honor with Mr. Deering [172] for a moment?

The Court. Yes.

[Conference at the bench.]

Q. You have said, Doctor, that you believe that she could be brought to accept treatments? A. Yes, I have.

Q. Do you regard her as a difficult patient, Doctor? A. Very.

Q. And if she were brought to accept treatment and the treatment were continued in the manner you have indicated, by residency in an institution with interviews with

a competent psychiatrist four or five times a week, do you have an opinion as to the probable outcome of that treatment? A. Yes.

Q. Will you state your opinion? A. My opinion is, that while there is a chance that that form of treatment would benefit her, that chance could not be more, in my opinion, than 50-50.

Q. Do you have an opinion, Doctor, as to how long that kind of treatment if commenced today would have to be continued before it would be possible for you or any other competent person in the field to state whether it would be successful or not? A. I would feel that any opinion as to the outcome of treatment made prior to one year—

[173] The Court. Oh, no, just listen— Oh, the question is one year; is that it—the answer?

The Witness. Yes. I would feel one year is the answer.

Q. You would not know for a year? A. No, sir.

Q. And the answer at the end of the year might be that the entire treatment was hopeless? A. That is correct.

The Court. I'm going to intervene just long enough to inquire, have you ever testified before in court, Doctor?

The Witness. Yes, sir.

The Court. I want to make certain that the questions which have been put to you up to now have elicited your full medical opinion? I am not suggesting there has been any intention on the part of Mr. Kelleher not to elicit your full opinion, medical opinion—quite the contrary; but I want to make sure whether you have laid before us everything of a medical nature which you would lay before your colleagues if you were discussing the matter in a professional atmosphere. Have you laid before us everything that you regard as relevant?

The Witness. I would like to add one opinion, your Honor.

The Court. All right, go ahead.

The Witness. That is, that in such institutions as [174] I have described, patients are committed to such institutions—

The Court. Oh, no, I'm going to stop you. I want you to discuss anything about this plaintiff, not institutions.

The Witness. I believe this plaintiff would have to be committed to an institution where she would perhaps have to stay even against her will.

The Court. Does that mean a state institution?

The Witness. No, sir, there are various private institutions at which this—

The Court. You mean something like McLean's Hospital?

The Witness. That is correct. Exactly like that, McLean's Hospital. Frequently in instances where a patient has not accepted commitment voluntarily, after a period of treatment a certain rapport is developed and the treatment begins to move; but I feel a patient like this plaintiff starting off with a voluntary decision to come to the psychiatrist would probably result in failure, just as it did with Dr. Bojar. This patient cancelled a good many of her appointments with him.

The Court. Well, that is a common experience of all psychiatrists, isn't it? Isn't it?

The Witness. The fact in this instance—

The Court. Well, isn't that so?

The Witness. It is frequent.

The Court. In the majority of instances?

[175] The Witness. Dr. Bojar reports—

The Court. In the majority of instances?

The Witness. Occasional cancelling is frequent in cases, your Honor, but not so much as this woman did. The evidence was that she was never very willing to come, never developed a relationship with him that would enable him to show her what was wrong.

I think really concludes what else I had to add, your Honor.

Q. Have you told us everything, Doctor, as to what your opinion is as to her present condition and as to what the possibility might be in the future? A. I believe I have.

Q. It wouldn't be strange if I have forgotten to ask you about something. I'm very much lost in this field. Now let us pass for the moment to another subject, if we may, Doctor. I am going to ask you to assume the facts contained in the hospital record, which is in evidence, and I am going to ask you to assume the facts which you yourself determined by personal interviews with this woman; I am going to ask you to assume further facts. Assume, in addition to what I have asked you to assume, that, on October 11, 1954, this woman was in a car of the New Haven Railroad; that she was standing at or near a counter in the course of her duties as a waitress; that she was facing forward in the direction in which the train [176] was proceeding; that that train proceeded at a speed of from 12 to 15 miles an hour; that the brake was applied by the engineer, thrown immediately into emergency position; that the train stopped within 30 to 40 feet. I ask you to assume further that as a result of that stop this woman was thrown against the counter; that immediately thereafter she was found in a condition of hysteria; that she was brought back to Boston to the Back Bay Station and upon arrival there was met by her father, whom she did not recognize; and I ask you, based on those assumptions, do you have an opinion as to whether what happened on October 11, 1954, is an adequate cause of the condition as you find it? Do you have an opinion upon that question? A. I have.

Q. Will you state that opinion?

Mr. Deering. I object.

The Court. What was the ground of objection?

Mr. Deering. I think there are other facts the doctor should take into consideration in that hypothetical question.

The Court. What?

Mr. Deering. Well, the subsequent events after the happening of the accident and the subsequent history.

The Court. Well, I have no doubt that on cross-examination you may ask about those additional facts. It might be, and I certainly don't think it is but it might be, [177] that the doctor's opinion is that the facts recited are an adequate cause. It's up to him to tell us. It may be there are other facts that were necessary in order to constitute an adequate cause. If that is, the doctor will tell us of that. Whatever his answer is, you will have an opportunity on cross-examination to test it.

Now the question is, in your opinion were these an adequate cause for the condition in which the plaintiff now is?

The Witness. I believe, in answer to that, there are more facts that should be considered.

Q. Will you state those, Doctor? A. In examining this plaintiff I sought to find any evidence of any predisposition to mental disease, that is, I searched through her history as I could obtain it from others, from her father, from her husband, and from what I understood to be her record of employment—to look for the possibility that she might have suffered from some milder version or some other version of emotional disease before the given date. I was unable to find any such evidence. I feel the factor of the personality of the patient before any trauma or accident has to be considered. I would never fail to consider it. In this case I didn't find any evidence that this woman was failing to perform her tasks until that day.

Q. You had therefore made the additional assumption that until that day she did adequately perform her tasks,

including [178] those of waitress on the New Haven Railroad; that is an additional assumption? A. As far as my evidence shows.

Q. You make that additional assumption? A. That is correct.

Q. Now have we included all the assumptions which are to be taken in account that will allow you to answer the question? A. I believe we have.

Q. And on the basis of those assumptions do you have an opinion as to whether what happened on October 11, 1954, was an adequate cause for her present condition? Yes or No. A. I do, yes.

Q. Will you state your opinion, please? A. My opinion is, that the events as stated on that day are consistent with—

The Court. No, no.

A. —and form a cause—

The Court. No.

A. —adequate cause—

The Court. No, you must answer the question; and if you do not feel you can answer the question you may say you can't, but the question is, were they an adequate cause? Now you were not asked whether they were consistent, and you will please answer *the* particular question.

A. I believe they were an adequate cause.

[179] The Court. Is there some reason why you originally wanted to use the word consistent?

The Witness. Yes, there is.

The Court. What was that reason?

The Witness. Because my training tells me that one cannot possibly know all the facts about an individual prior to some event if there has been no examination prior to the event. However, the overt facts, the ability to work before the accident and the inability thereafter, and the apparent absence of a psychotic condition before the accident and the

presence of that condition after, are the reasons why I gave the answer as an adequate cause.

The Court. Well, you have given an apparently candid and interesting and instructive answer, and you also were very fair in requiring the hypothetical question to take into account certain factors of past history, and the impression you have left upon me, although it may not be the impression left upon the jury, is that there is a blank about which you don't know as much as you wish you knew. Is that right?

The Witness. I feel I wish I knew more about this woman's personality prior to the accident other than the facts I have, but my experience tells me it is almost always impossible to find out this kind of information. This woman is disturbed enough so she can't give it.

The Court. But if I have understood your testimony [180] correctly, you are saying there is an "X" factor which you do not know and cannot find out.

The Witness. That's quite true.

Q. Isn't that always true in the case of a diagnosis such as you speak of? A. That is right. It is always true.

Mr. Kelleher. Your witness, Mr. Deering.

Cross-examination by Mr. Deering

XQ. Then there is a question in your mind, Doctor, as to whether or not there may not be some other underlying factor here? A. Yes, there is, as there is in every case.

XQ. And the principal thing that seems to be disturbing this woman when you saw her was not the physical injury she had received, was it? A. No, sir.

XQ. It was the reaction that she had to the accident; is that right? A. Yes, that's correct.

XQ. And particularly the reaction she had to this pending litigation? A. No, sir, there was something that was disturbing her more than that. The death of the woman.

XQ. The death of the woman. And she was tying up in her mind the pending litigation in regard to her own injuries with the [181] death of the woman; is that right? A. That is correct.

XQ. And isn't it a fact that if the litigation were removed, in other words, this case here brought to a conclusion, wouldn't that be one of the elements that would probably enter into her cure? A. I don't believe so. She ties up everything with this event.

XQ. If she is disturbed about this proceeding here, wouldn't the removal of this particular proceeding tend to benefit her mentally? A. I believe she would replace the concern about this litigation with another concern that she would tie up to the same event, such as tying up her mother's passing away to the same situation, as she did.

XQ. Well, that condition which you found with this, what you call it, paranoid psychosis is something that is not only affecting her relations in regard to the litigation but other aspects of her life; isn't that right? A. Yes.

XQ. And in inquiring about other aspects of her life I take it you were not able to bring out anything of importance that you could elicit from her except the fact that she had an accident; is that correct? A. I obtained a history from her father and husband as well [182] which gave an essentially normal school history, work history, history as a wife and mother.

XQ. But you weren't able to obtain anything of that kind from her? A. Only a few assurances but nothing in detail from her.

XQ. That is, what you obtained from her, I take it, was her feelings and ideas in regard to the pending litigation; isn't that right? A. Yes, some of them were about that, but there were other distorted ideas as I have suggested.

XQ. And what were those distorted ideas? A. The idea that her mother's death was a way of sealing off in-

formation about this presumed murder; the idea that all people concerned in her life currently were suspicious of her.

XQ. But that again was tied in with the pending litigation, wasn't it? A. There was other material, too, about a change in tolerance of her husband and son, her inability to tolerate caring for them, her return home to live with her father.

XQ. Wasn't that something to do with the fact that she was suspicious of her husband because he had something to do with this litigation? A. I have no information on that point.

XQ. That is, you didn't know about that? A. No.

[183] XQ. And on all these occasions you have reported on here you found her difficult to examine and to get admissions from; is that right? A. That is true.

XQ. And, in other words, what you got you had to pry out of her? A. With certain exceptions, yes.

XQ. And on all these occasions the purpose of seeing her wasn't for any treatment that you gave her; is that right? A. That is correct.

XQ. That is, you were merely attempting to determine her condition with reference to testifying in court, were you not? A. I was attempting, first of all, primarily to determine her condition with regard to future care or treatment, what was her disease, and what to do about it.

The Court. Well, as I understand it—it may be I am incorrect—plaintiff has offered this witness not as a doctor who treated this plaintiff but as a doctor who was to see her as an expert and is offered to describe the condition of the plaintiff. Am I correct?

Mr. Kelleher. That is correct, yes.

The Court. No reference has been made to his bill or anything of that sort.

Mr. Deering. I think that is quite true, your Honor.

XQ. Well, did you suggest to her or her attorney any future [184] treatment until what you suggested today? A. Prior to today I have suggested to her attorney a similar course of treatment to what I mentioned.

XQ. And when you first saw her she hadn't had any treatment since the last treatment of Dr. Bojar; is that right? A. No psychiatric treatment.

The Court. When did she stop treatment with the other doctor?

The Witness. 1956.

The Court. Have you seen the records of that medical treatment?

The Witness. I have.

The Court. Was that doctor any more successful than you in finding out something about the plaintiff's background?

The Witness. Yes, she was apparently mentally disturbed at that time, and he found out some information from her. However, he noted the beginnings of some of her delusional ideas at that time.

The Court. Did he uncover something earlier than the accident which was drawn to your attention?

The Witness. No, he did not, as far as I received any information; no.

The Court. Am I to understand it is your testimony that although you do believe it would be relevant to find out something, if something exists, before October 11, 1954, you [185] in spite of diligent inquiry have not been able to find any such psychiatric or psychological or psychoanalytical evidence?

The Witness. That is correct.

The Court. This is out of the ordinary in your practice, isn't it? You usually find something earlier as well as something immediate in the case of disturbed people?

The Witness. Yes, often we do. It varies in cases. Sometimes it is very difficult. I felt I had an unusual difficulty here because of her condition; and often the material one looks for is personal and cannot be gotten from anyone else.

The Court. Wouldn't it be fair to say that a plaintiff or other person, a patient, who has the kind of condition which this woman had, age 45, probably had some sort of mental condition age 35?

The Witness. Here I would have to say, your Honor, that different persons with different personalities react to accidents, traumas, in different ways.

The Court. We all would agree to that. But would you answer the question, Isn't it true that somebody who has a mental condition age 45 of the type which this plaintiff has, speaking in the great majority of cases, would have had some kind of disturbed mental condition age 35?

The Witness. I would agree with you on that point.

The Court. And isn't it fair to say that you cannot [186] really discuss the extent to which any particular event accelerated or contributed to a situation age 45 unless you also know what the situation was age 35?

The Witness. I can't agree with that statement, your Honor.

The Court. All right. Then tell me why.

The Witness. Frequently, if an event is traumatic enough, serious enough, and if it happens to coincide with problems that are already existent in the patient's life but which have been up to that time coped with successfully, it may throw the balance to the side of illness and cause these problems to no longer be coped with successfully,—for example, the death of a person against whom the patient has antagonisms frequently causes a guilty reaction in the patient although the patient did not cause the death. So that—

The Court. Needless to say—I'm sorry, I didn't mean to interrupt.

The Witness. So that I feel that although this woman may have had a personality disturbance of some kind there was no overt evidence it was severe enough to interfere with her life adjustment, so in some ways the event in this accident must have upset the balance and allowed this change.

The Court. Needless to say you are more expert than the Court, perhaps than counsel, perhaps than the jury with [187] respect to this whole area; but the point which you have left me unclear about is this. This plaintiff, as we all know from the evidence, was in no way the physical cause of the death of the woman in the Providence Station. She played no role in connection with that disaster, unless you say that she also was a victim in the sense that she was thrown by the movement of the train which killed the woman. It is a very, to me, extraordinary connection which she makes between the death of the woman and her own guilt. I say it is extraordinary only because I do not see even the weakest sequence of connections. I would perhaps, if I knew a great deal about her mental history, her whole inner life, her range of experience and practice, her diversions from the normal, and the like, her waking and dreaming life, be able to see the connection. What I ask you is how you, absent knowledge of all these things, can see the connection.

The Witness. I don't feel I can see this connection.

XQ. Well, Doctor, is it the fact that the opinion which you have given was based upon what you have found her condition to be without any reference to her physical injury that she received at the time of the accident? A. I don't understand the question.

XQ. In other words, it is the physical condition that re-

sulted from the accident, that is, the physical injury which enters into this mental picture that you have?

[188] The Court. The fact that she was thrown against a counter or hit something or lost her balance—does that enter into it?

The Witness. None of the physicians or specialists who examined her, according to the records, ended up feeling that she had a physical injury of any consequence.

The Court. No, no, would you answer the question?

The Witness. It would appear that the same mental process which enabled her to feel guilty about the death of the woman she did not have anything to do with also enables her to fixate on her physical symptoms and prolong them and make them more severe.

XQ. That is, any physical symptoms that she had following the accident have been greatly exaggerated by her mental condition; is that right? A. Yes, I would say that is the opinion—

The Court. I thought Mr. Deering asked for something else but evidently he didn't, he didn't follow up in the way I thought he was going to. As I understand it—I may not understand correctly your testimony—you have said that whatever she has in the way of mental disturbance was not the result of a physical act, or trauma: it is the result of her impression of that trauma and her impression, meaning her mental reaction, to the death of the woman, that is to say, the connection is solely mental and is not what one might call [189] the equivalent of an impairment of the brain by a blow or other external event?

The Witness. I have no evidence of brain damage.

The Court. Therefore the whole process is the process of mental construction or destruction within her mind?

The Witness. With the sole exception of the possibility of some damage at the time, which no one has been able to show by laboratory tests.

The Court. There is no one who has said that.

The Witness. There is no evidence of that. That is correct.

The Court. Have you ever in your practice found any other patient who, having witnessed or participated in an event where someone was killed, himself or herself suffered anything like the consequences it is claimed this plaintiff suffered as a result of being a participant in or a witness of a death?

The Witness. I have heard of similar cases to this.

The Court. In your practice?

The Witness. I have never treated a patient who has had this type of reaction exactly.

The Court. What is this connection called medically? What kind of description has it in medical literature?

The Witness. I'm not sure what—

The Court. Well, you say it was a type of situation which is known to you through medical literature.

[190] The Witness. That is correct.

The Court. What is it called?

The Witness. I will say this as far as terminology. This woman apparently suffered—

The Court. Please don't wander from the subject. I'll let you lecture me later. But answer the question.

The Witness. I'm trying to give you the name that I have got. This woman had two reactions with two names. The first reaction she had was to the minor physical injury, and that is called an hysterical conversion reaction which was, as I spoke, prolonging and exaggerating the effect of the injury. This to some extent remains. However, there is a more serious connection which is called the development of an idea of reference which occurs in persons with paranoid psychosis.

The Court. In people who are already ill?

The Witness. They need not necessarily be so.

The Court. You said it happens to persons with a paranoid psychosis. What does that mean?

The Witness. This woman apparently developed—

The Court. No, no, please answer the question. Don't fence with me. Please answer the question. What does paranoid psychosis mean?

The Witness. It is a mental disease characterized by suspiciousness, by the presence of ideas of guilt and [191] reference to one's self of events not connected with one's self.

The Court. If you had such a condition, then observing a death would cause this reference; is that right?

The Witness. Yes, sir, that is true.

The Court. So you must have the psychosis before you can have the reference; is that right?

The Witness. I can't go along with that.

The Court. Well, is that what you just said?

The Witness. No, there is a qualification, your Honor, I have to make.

The Court. Well,—

The Witness. Frequently one finds the development of an idea of reference as the first indication of the development of such a psychosis.

The Court. You mean, it may be the first overt manifestation but the situation must have existed first, mustn't it? A psychosis must exist before the reference exists; isn't that right?

The Witness. One has to presume that.

The Court. Isn't that your medical testimony as an expert?

The Witness. Yes, sir.

The Court. Yes.

Mr. Deering. I have no further questions.

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[194] EDWARD WILLIAM BREWSTER, *Sworn*

Direct Examination by Mr. Deering

Q. What is your full name? A. Edward William Brewster.

Q. Where do you live, Mr. Brewster? [195] A. Kingston, Rhode Island.

Q. What is your occupation? A. I'm a research chemist.

A Juror. I can't hear.

The Court. Research chemist.

Q. Keep your voice up so these gentlemen over here can hear what you say.

Now on the 11th of October 1954, were you at the Providence Station? A. I was.

Q. What was your purpose in being there? A. I commuted from Providence to Kingston, to school.

Q. Did you take any particular train? A. I did.

Q. And can you tell us what train that was? A. I believe it is 8.55 from Providence to Kingston.

Q. And were you there when the train came into the station? A. I was.

Q. Can you tell us where you were? A. I was on the platform. I don't exactly know where but I was near a baggage cart.

Q. That is, you were on the platform adjacent to the track upon which the train was coming in? A. I was.

Q. And I will show you this plan which—it hasn't been marked [196] as an exhibit.

The Court. Hasn't it been marked already?

Mr. Deering. We had another plan.

The Court. The blueprint is Exhibit 1. Do you want another one marked?

Mr. Deering. I have another one which is an enlargement of this particular track and platform.

The Court. In other words, it is admitted as 1a, being an enlargement of 1. Right?

Mr. Deering. A part of 1.

The Court. All right.

Mr. Kelleher. No objection.

[Said blueprint marked Plaintiff's Exhibit 1a.]

The Court. Step down, Mr. Brewster, if you will.

[Witness advances to jury box.]

Q. Well, this end of the platform is the east end as we have called it, and this is the area, I believe, you had reference to as the platform, and these two lines here indicate the tracks, and this broken line indicates the fence, and here there are two kiosks. Those represent the covering over the stairways; is that correct? A. Yes.

Q. As you came up to that platform can you tell us how you approached it? A. I came from this kiosk, walked down the platform to approxi- [197] mately here [pointing].

Q. That is, you are pointing to a point—let us say those dots represent posts. That would be the fifth post from the stairway? A. Approximately the fifth post.

Q. Approximately the fifth post. What did you do when you got there? A. I was standing there. There was a baggage cart behind me.

Q. You say a baggage cart behind you. Was there a baggage cart on the platform? A. Yes, there was.

Q. Where was that with reference to the place where you were standing? A. I was leaning against it. I put my books on it.

Q. And then after putting the books there what did you do? A. I stood there waiting for the train to come in.

Q. And while you were there did the train come in? A. Yes, it did.

Q. Before the train came in can you tell us what, if anything, you saw there, anything that happened? A. There was a woman on the platform to my left, and in the course of time there she came up to me and asked me, in broken English, if this was the train to New York, and I said, "Yes," and she asked me where it came from, and I said, "Boston." Then she asked me if it was on time. I said I thought it was [198] on time.

Q. That conversation took place about the fifth post? A. Yes.

Q. And she had been to your left before you engaged in conversation? A. She was to my left, yes.

Q. Then after you engaged in conversation what did she do? A. She moved back to the left again.

Q. How far back to the left did she move? A. About 20 feet or so.

Q. Did you continue to observe her? A. No, I just stood there waiting for the train to come in.

Q. Did you see her at some time later? A. Well, the train started to come into the station, and I turned around and took my books off the cart, and I turned back to observe the train and saw the woman on the tracks, between the rails, bent over, so I took two or three steps toward her but the train came and I turned my head away.

Q. That is, when you first saw her how far was the train from her at that time? A. I couldn't answer that. I don't remember.

Q. What happened then? A. Well, the train passed over her. The cars stopped, the train stopped, and her body was under the engine.

Q. Can you give the distance in approximate feet that the train [199] was from her when you noticed her on the tracks? A. I would say 10 or 15 feet. I couldn't give it exactly.

Q. Can you indicate —

Mr. Deering. Can we put a mark on here?

The Court. Yes, you may. Where the fifth post is, you mean?

Mr. Deering. Where the fifth post is.

The Court. Yes. Put a mark there and then we'll know what you are talking about. The exhibit is now marked. You will return, Mr. Brewster, to the stand for cross-examination.

Cross-examination by Mr. Kelleher

XQ. When you first saw this woman on the track, Mr. Brewster, I think your testimony was that she was kneeling down? A. She was crouched between the rails.

XQ. That's when you first saw her? A. That's when I first saw her between the tracks.

XQ. And at that time you say the train was 10 or 15 feet away? A. That's right.

XQ. I take it you did not see her go on the track? A. I did not. I had my back turned to the scene.

Mr. Kelleher. No further questions.

The Court. You are excused. Next witness, please.

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[200] CÉCILE DUPERE, *Sworn*

Direct Examination by Mr. Deering

Q. What is your full name? A. Cecile Dupere.

Q. Where do you live, Miss Dupere? A. 101 East County Street, Somerset, Massachusetts.

Q. Now, on the 11th of October, 1954, were you in the Providence Station? A. I was.

Q. And what was your purpose in being there? A. I was going away on vacation. We were going to the Lake Mohawk Mountain House.

Q. And did you intend to take this train that morning? A. Yes, we did. I believe we were scheduled to take the, well, it was the 8.55. That's my recollection.

The Court. 8.55? 7.55, you mean, don't you?

The Witness. Well, now, it's a question of Daylight Saving Time. According to my recollection, it was 8.55.

The Court. All right.

Q. In any event, Miss Dupere, were you there when an accident occurred? A. Yes, I was.

Q. Will you tell us where you were approximately? A. I was standing approximately 6 feet from the stairway.

[201] Q. And while you were there will you tell us what you saw happen? A. Well, I remember seeing the train coming around the bend, that is, from Boston, going south to New York, and I was sort of counting the train just for something to do, when suddenly I noticed this woman kind of step off the platform and started to walk on to the tracks. My first thought was—

Q. You can't tell us what you thought. A. Well,—

Q. You saw her step off? A. Yes.

Q. Where was the train at that time, when you saw her step off? A. It was approaching towards the woman.

Q. Can you give us the distance, the approximate distance in feet? A. No, that I believe I could not.

Q. And where was the woman when you first noticed her, when she came to your attention? A. Well, I would say she was standing approximately 60 feet or 80 feet from where I was standing.

Q. That would be east of where you were standing, that is, towards the train? A. Yes, sir.

Q. And where was she with reference to the edge of the platform, that is, near the track? [202] A. Well, I would say she had walked over to the second rail of the track.

Q. I think you said you saw her step off. Did you see

her before she went over to the second rail? A. Yes. You mean, while I was on the platform?

Q. While you were on the platform. A. Yes, I did.

Q. I want to find out when she first came to your attention where she was, either on the platform or wherever you saw her? A. No, I would say she was already off the platform.

Q. When you first noticed her? A. Yes.

Q. And you had noticed the train before you had noticed her; is that correct? A. That is correct.

Q. And from the time you first noticed her until the accident occurred, can you tell us what you saw her do? A. Yes. She was sort of crouching, I would say, or in a stooping position as she walked over to the second rail of the track.

Q. Was she crouching first or did she crouch at some time after? A. Well, my recollection is, I believe she was crouching all through the—while I saw her. She wasn't standing upright.

Mr. Deering. I think that is all. You may inquire.

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[203] SARAH LOUISE BOWEN, *Sworn*

Direct Examination by Mr. Deering

Q. What is your full name? A. Sarah Louise Bowen.

Q. Where do you live, Miss Bowen? A. 436 Prospect Street, Fall River, Mass.

Q. On the 11th of October 1954 were you at the Providence Station? A. I certainly was.

Q. You were there to take a train? A. Yes. To New York.

Q. Were you there when an accident occurred? A. Yes, I was.

Q. Can you tell us approximately where you were prior to the happening of the accident? A. Prior to the accident and during the accident I was about three poles or posts from the stair well.

Q. That is, you were standing at about the third post? A. Yes.

Q. That would be in which direction from the stair well? [204] A. It's the side toward Boston.

Q. Had you come up the steps? A. Oh, yes.

Q. Leading up to the platform? A. Yes.

Q. Adjacent to the track?, A. Yes.

Q. And this post would be in this vicinity, the vicinity of where you had come up? A. Yes.

Q. And while you were standing there will you tell us what you observed, if anything, in regard to the happening of the accident? A. Well, the train was approaching at a normal rate of speed—

Mr. Kelleher. No, no.

The Court. Well, that's certainly out. You may not tell us because I don't know and the jury doesn't know and I suspect you don't know what the normal rate of speed is. You can tell us how quickly it was going if you have an estimate in mind.

The Witness. I'm sorry but I don't have any estimate.

The Court. All right. Then we don't want any characterization.

The Witness. It wasn't going fast.

The Court. No, the jury will disregard it, and you [205] will please stay within the directions of the Court—not that I think you intended to violate them, but we cannot take testimony except in terms of miles per hour or its equivalent.

The Witness. I see.

Q. That is, you saw the train approaching; is that it? A. Yes.

Q. And did you also see a lady there? A. Yes, I did.

Q. And where was she with reference to where you were? A. Well, as I remember it, she was at approximately the fifth post.

Q. And what did you see her do, if anything? A. She put her coat on the baggage rack that they call it, and she stepped out slowly and stepped over in front of the engine. I thought she had dropped her purse—

The Court. No, no, not what you thought. What did you see, not what you thought.

Q. Let me ask you this, Miss Bowen. When you first saw her was she on the station platform? A. Yes, she was.

Q. And you saw her do something with reference to her coat? A. Yes, she put her coat on the baggage rack.

Q. Where was that? A. Well, approximately 20 feet from where we were standing.

[206] Q. That was well to your— A. Left.

Q. To your left, toward Boston? A. Yes.

Q. And then after she put her coat on this baggage rack, as you call it, what did you see her do then? A. She stepped slowly across the platform, toward the track.

Q. Was she within your observation from the time she laid her coat down until the accident happened? A. Yes, she was.

Q. When you first saw her step on to the track can you tell us approximately how far the train was from her? A. It was very close.

The Court. No. Let me just explain it to you. Perhaps if I explain it to you, you will know why you cannot use adjectives like "close," "fast," and so forth.

The Witness. I see.

The Court. The reason—just a moment, please. The reason you can't do it is because what seems to you close might seem far to someone else.

The Witness. Yes.

The Court. And the word "close" does not define itself except subjectively. If you use feet or miles, that is an objective measurement, and then we can all know what you are talking about. If you can tell us approximately, not [207] exactly, how many feet away something is, then you can tell us; but you cannot use the adjectives "close" and "far" or anything like that, because if you do you may mean one thing and those who hear you may understand something quite different.

A. I would say 5 feet.

Q. That is your best estimate? A. Yes.

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PER ARTHUR NELSON, *Sworn*

Direct Examination by Mr. Deering

Q. What is your full name, Mr. Nelson? A. Per Arthur Nelson.

The Court. What is it?

The Witness. Per, P-e-r.

Q. Where do you live, sir? A. 904 Park Avenue, Cranston, Rhode Island.

Q. What is your occupation? A. Car Inspector at the Providence terminal.

Q. You are employed by the New Haven Railroad? A. That is right, sir.

Q. And were you there at the station on that morning in [208] connection with your duties? A. I was, sir.

Q. Can you tell us where you were before the train that was later involved in an accident came in? A. I was standing between Tracks 3 and 5, I'd say about 40 or 50 feet from the crossing, from the east end, waiting for the train to come in to do my really regular inspection.

Q. That is, you were about to perform some duties in connection with the train? A. I inspect that—on that one day that was my job to inspect the train coming in.

Q. Can you tell us while you were there did you see the train come in? A. I did, sir.

Q. And did you see an accident that occurred there at the station? A. I did.

Q. And will you tell us whether or not at some time you saw this lady that was later struck? A. I saw her, yes.

Q. And when did you first notice her? A. As the train was coming in, I follow the train as it was going by me, starting with the diesels; to make sure that the hoses, the metallics and all the underframing there's nothing dragging, and as I was watching the diesels go by me my head [209] turned towards the west, and I saw her at the fence. The next thing I know the train stopped.

Q. That is, you saw her on the track? A. Yes, at the fence.

Q. At the fence? A. Yes, sir.

Q. Did you actually see the accident occur? A. I didn't see any more than that. That's all.

Q. And I take it from what you said, you were east of where the accident happened? A. I was, on the east end.

Q. Had part of the train gone by you? A. The only portion of the train that had gone by me was the diesel.

Q. That is, the diesel had got by you? A. The diesel had got by me because as it got by me I started to walk up.

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JAMES D. MEEGAN, *Sworn*

Direct Examination by Mr. Deering

Q. What is your full name? A. James D. Meegan.

[210] Q. Where do you live? A. 40 Ridge Road, Hamden, Connecticut.

Q. What is your occupation? A. Passenger trainman.

Q. Employed by the New Haven? A. New York, New Haven & Hartford Railroad.

Q. Were you at the Providence Station on October 11, 1954? A. I was.

Q. And did you witness an accident that morning? A. I did.

Q. And will you tell us where you were and what you observed? A. I was walking down to tell a man to get off the edge of the platform for fear he would be hit by the train, No. 5, which was coming into the station, and I saw this lady take her coat off and put it on the ice truck, as she stepped out into the track. I thought she had dropped something and was going to pick it up, and I noticed then she was stooping forward with her pocketbook in both hands as though she was going to lay her head on the rail. I started—I yelled and I started to run towards her, and by that time I saw I couldn't make it and I stopped. I walked up ahead then after the train had struck her and I looked to see if she was still alive.

The Court. Well, we don't want to hear any more.

Q. You don't need to go into that. Will you tell us in which [211] direction you were facing when you first noticed this lady? A. I was west of her, towards the stairway.

Q. Had you come up the stairway? A. As you come up the stairway, I was walking towards where the train was coming in, walking eastward.

Q. And were you in motion when you first noticed her? A. I was.

Q. And how far were you from her when you saw her take her coat off? A. I would say about 50, between 50 and 55 feet away from her when I first noticed her taking her coat off.

Q. When she started to step out on to the track, how far was the train away from her at that time? A. I would say the train was about 35 or 40 feet away from her.

Mr. Deering. That is all. You may inquire.

Cross-examination by Mr. Kelleher

XQ. Did you see her walk across the track, Mr. Meegan? A. I did.

XQ. Walk across the tracks to the farther rail? A. Sir, I didn't understand the question.

XQ. Did she walk across the track to the farther rail, the rail farthest from the platform? A. She walked towards the farther rail.

XQ. Did she get as far as that? [212] A. She was about a foot away from us when she started to stoop.

XQ. She walked towards the fence? A. Yes, sir.

XQ. And while she was walking towards the fence she was facing south, was she? A. Yes.

XQ. Not facing the train? A. She half faced toward the train when she started to put her head down.

XQ. At some time did she turn toward the train? A. I couldn't see because I was—

The Court. If you didn't see it, then don't say.

The Witness. I couldn't say that she faced towards the train.

The Court. Well, if you didn't see, don't say.

XQ. How far did you say it was the train was from her when she stepped off the platform? A. When I first noticed her stepping off I should think the train was 35 or 40 feet away.

XQ. You say you thought she was trying to put her head on the rail? A. It appeared to be that way.

XQ. Which rail? A. The far rail from the platform, nearer the fence.

[213] XQ. Were you there when the body was brought—she was still alive, was she not? A. She was still alive when I got down there.

XQ. Were you there when she was brought from under the engine? A. No, the conductor sent me up—

The Court. No, no, the answer is No.

The Witness. No.

XQ. Did you see her at any time subsequently? A. No, I did not.

. . . . . .

PAUL E. LEWIS, *Sworn*

Direct Examination by Mr. Deering

Q. What is your full name, Mr. Lewis? A. I beg your pardon?

Q. What is your full name? A. Paul E. Lewis.

Q. Where do you live? A. Sagamore, Massachusetts.

Q. What is your occupation? A. I am either a locomotive engineer or fireman, both.

Q. Now in 1954, on October 11, were you working for the [214] New Haven Railroad? A. I was.

Q. And what was your work on that day? A. I was fireman.

Q. Were you fireman on the train which was involved in the accident at Providence? A. That is right.

Q. Now we have a photograph here, I think, of that engine.

The Court. It is not a photograph of the engine that was said to be there that day but it is the same type of locomotive.

Q. Mr. Lewis, this photograph, which has been marked as Exhibit—

The Court. 3.

Q. Exhibit 3—that is a locomotive of a type similar to the one you were on that day? A. That is right. That type are all the same.

Q. And you were seated in what position in that locomotive as you came into the Providence station? A. On the left side of the cab.

Q. Now do you want to come over to the jury and point out where you would be seated in that locomotive?

The Court. Am I correct in my recollection? You did not see the accident; is that right?

The Witness. I beg your pardon?

[215] The Court. You didn't see the accident, did you?

The Witness. I didn't see the actual striking. I saw the woman originally start out. [To the Jury.] This is where I was sitting in the cab, on the left side [pointing].

Q. Can you step back, Mr. Lewis? [Witness returns to stand.]

Did you have a seat there where you sat there that morning? A. Yes, sir.

Q. And your view, I take it, was through that windshield directly in front of you? A. That is right.

Q. And as you came into the Providence station that morning will you tell us what, if anything, you observed in regard to this lady that was struck by the engine? A. Well, coming into a station, from the locomotive you get a partial view. It's hard to discern anything in particular unless it is out of the ordinary. But this particular morning, this woman started from the platform into the path of the locomotive, a very short distance.

Q. Where was she when you first saw her? A. Well, she was leaving the platform.

Q. And how far was the engine from her when you first observed her, noticed her? A. Well, I can't give you—a very close distance.

The Court. No, no, that doesn't help us at all.

[216] Q. Can you give us the approximate distance in feet? A. How wide is this room?

The Court. Well, was it the width of the room?

The Witness. Roughly.

The Court. Gentlemen, according to the chart in front of me, the distance from where the witness is to the other side of the jury box is approximately 35 feet. Will you say that that is the distance?

The Witness. I would say approximately that distance.

Q. And from the time you first saw her did you do anything or say anything? A. No, sir. There wasn't time.

Q. What did you observe the engineer do? A. Why, he immediately applied emergency brakes. There wasn't time for words to be spoken.

Mr. Deering. Your witness.

Cross-examination by Mr. Kelleher.

XQ. You saw this woman when she stepped off the platform, Mr. Lewis? A. She was just leaving the platform.

XQ. There was nothing that obstructed your view, that prevented you from seeing her? A. No.

XQ. After she stepped off the platform did she then step over [217] the nearer rail? A. I couldn't observe that from my position.

XQ. Did she at some time arrive at a position about the middle of the track between the two rails? A. At the finish, yes.

XQ. Did she at some time pass the middle of the track toward the farther rail, as you observed her? A. No, I didn't observe that.

XQ. When you first saw her she was proceeding directly toward the fence, was she not? A. Well, yes, it had to be

towards the fence, that is, towards the path of the locomotive.

XQ. Was there any opening in the fence at that point? A. I wouldn't know.

XQ. Didn't you observe? Didn't you observe? A. Well, there's no regular opening in the fence. There's no gate or path or traversed way.

XQ. I'm going to suggest to you, Mr. Lewis, that this woman stepped from the platform, stepped over the first rail, crossed the center of the track, approached to the farther rail. Didn't you see that woman? A. No, sir.

XQ. I'm going to suggest further, that when she got to the farther rail she turned and faced toward the train. Did you see that? [218] A. No, sir.

XQ. And I'm going to suggest further, that after she turned she walked back at least one step to the center of the track. Did you see her do that? A. No, sir.

XQ. You at no time made any suggestion to Mr. Craft, the engineer? A. I beg your pardon?

XQ. You at no time made any suggestion to Mr. Craft, to your engineer? A. No. I started towards him when the woman started off the platform but he was already doing his work.

XQ. You saw him apply the brakes in emergency? A. That is correct.

XQ. Were you at the hearing that was held in the Providence terminal on October 12, 1954? A. Beg your pardon?

XQ. Were you at the hearing before the Terminal Manager, the Terminal Superintendent, that was held October 12, 1954? A. No, sir.

XQ. You were not there? A. No, sir.

XQ. Were you asked to come? A. No, sir.

Mr. Kelleher. No further questions.

[219] Mr. Deering. I have a motion and some requests.

The Court. I will take the requests. The motion is denied.

Mr. Kelleher. May I submit my requests?

The Court. Yes. Maybe you had better submit the requests tomorrow morning because I don't want to take them unless counsel on the other side has submitted his.

---

[222] CHARGE TO JURY

WYZANSKI, D. J. Mr. Foreman, and Members of the Jury, this case is in this Court pursuant to an Act of Congress, the Federal Employers' Liability Act, which governs claims made by employees of railroads against railroads for damages which they allege were caused, in whole or in part, by the negligence, that is, the lack of due care, of employees, agents and servants of the railroad.

At the outset of his argument to you on Monday, quite justly Mr. Kelleher praised the common sense of the jury. Having sat with some of you for many weeks and others of you for a shorter period of time, I have confidence in your common sense. And I also have confidence in your capacity, despite the very tragic nature of the circumstances in which the plaintiff now is, to focus on those facts which are before you, and those principles of law which I give you, without being improperly diverted by any emotional, non-rational considerations. I know that you will not allow yourselves to be prejudiced for or against the plaintiff merely because she is mentally incompetent and unable to testify here. I know you will not be prejudiced for or against the defendant because it happens to be a railroad corporation. As Abraham Lincoln once said in a case in which an individual plaintiff brought suit against a railroad, in the course of an argument made by [223] somebody not with Mr. Kelleher's integrity and skill,—the argument

made was, that the plaintiff was an individual and the defendant was a corporation. Abraham Lincoln said, "Yes, it is a corporation, the shares of which are owned by widows and orphans as well by others."

The fact that the parties are an individual and a corporation is entirely irrelevant. The fact that the company is a railroad is relevant only in this sense: that it is because it is a railroad the Congress has the power to enact a statute and you have the power to hear the case. The fact that a railroad employee is injured is not, under the Act of Congress or any other principle of law, by itself sufficient to entitle the employee to recover. Congress has not passed an insurance law providing that any employee of a railroad injured during the course of his employment is entitled to be paid. The law is much more specific. And, as Mr. Kelleher quite rightly said, his client, Mrs. Henagan, has the burden of proving to you three things:

First, that there was a breach of duty toward Mrs. Henagan on the part of the railroad, its employees, agents and servants;

Second, that that breach was the legal cause in whole or in part of the injuries which the plaintiff suffered; and

Third, the plaintiff has the burden of proof as to the amount of recoverable damages, if any amount be recoverable.

[224] In this case there is no suggestion of contributory negligence by the plaintiff. No argument on that score was addressed to you and, indeed, none could have been in the light of the facts. So, the three issues are those which I have stated, as to each of which the plaintiff, Mrs. Henagan, otherwise known as Miss Donnelly, has the burden of proof; breach of duty; causation; damages.

Now what of the problem of breach of duty? The plaintiff must show that a railroad employee failed with respect

to the plaintiff to exercise that kind of care which a reasonable and prudent person in a situation of that employee should have exercised. This is not a case against the heirs, administrators, executors and assigns of Mrs. Montell, the suicide. You and I are not concerned as to whether she before her death did something which a reasonable and prudent woman would not have done, and whether her failure gives to somebody a cause of action. We do not have her in this world, and we do not have any of her representatives in this Court. You must disregard any liability, if any exists, on the part of her estate or those who received property from her.

In looking at the railroad employee or employees, you are to judge them not by hindsight. You are to look at the picture as nearly as you can as though you were there at the time, October 11, 1954, at approximately 7.55 a.m., [225] in the Providence station. While Mr. Deering thought the plaintiff's contention was going to be that the plaintiff could justly complain that the engineer had not acted wisely when he saw the emergency, if I understand Mr. Kelleher's argument the plaintiff makes a somewhat different assertion. Through her counsel, Mr. Kelleher, Mrs. Henagan asserts that the engineer should have seen Mrs. Montell earlier, that his view of her was blocked either by his inattentiveness or the fault of some railroad employee in crowding the platform; and it is Mr. Kelleher's suggestion to you, that if the engineer had looked continuously and with an unobstructed view he would have seen Mrs. Montell and would have acted more promptly and thus avoided the shaking up of the plaintiff in the dining car or the club car.

Now I'm not going to tell you whether or not the engineer, Mr. Craft, did or did not act as a reasonable and prudent engineer should have acted on that day; but I am

going to remind you that it is the burden of proof of the plaintiff to persuade you by a preponderance of credible evidence, that Mr. Craft, or any other appropriate employee, failed to act as a reasonable and prudent person in his circumstances on that day, with the knowledge which he could have had then, and not four and a half years later.

If you are satisfied by a preponderance of evidence that there was a breach of duty on the part of an agent, [226] servant, or employee of the railroad, you will have to consider whether such breach, if it occurred, was the cause in whole or in part of injury to the plaintiff. You do not reach the issue of causation until you have first dealt with the problem of alleged breach of duty. If there was no breach of duty you bring in a verdict for the defendant without considering anything else. If there was a breach of duty you then have to consider the issue of causation.

There is a Latin saying which warns us against a logical fallacy. The Latin saying is, "Post hoc ergo propter hoc," which translated into English means, Because something occurred afterwards, then it occurred because of or on account of the earlier event. That is by no means always true. It is sometimes true but not always true.

You have to consider whether any damages, injuries or the like which the plaintiff may have were on account of, caused by, in whole or in part, a breach of duty by an employee, agent or servant of the railroad.

With respect to the physical shaking up which occurred at the moment of impact, or, rather, at the moment when the brakes were applied, it is rather easy for all of us to see the connection. But has the plaintiff persuaded you that the mental condition that she has was caused in whole or in part by the engineer putting on the emergency brakes?

With respect to this, you do have testimony offered [227] by an expert, Dr. Ginandes. You are not required to

believe an expert merely because he is an expert; and, despite the contrary argument addressed to you, there is no burden whatsoever on this defendant to bring in any expert or to meet the testimony of the plaintiff. It is the plaintiff that has the burden of proof with respect to the issue of causation.

Now, an argument was given to you that Mrs. Henagan had this mental illness afterwards but so far as appears she did not have it previously. And, if I understood the argument, you were asked from those facts to make an inference, that unquestionably the accident was the cause of the mental condition.

I shall not endeavor to remind you of what Dr. Ginandes said. You will remember it yourself, I am certain. But let me call your attention to something which you may also remember.

You remember that Mrs. Henagan's father, Mr. Donnelly, when he was on the stand said he was out walking with his daughter. We all, I'm sure, have the greatest possible sympathy for Mr. Donnelly, his present plight, and the difficulties through which he has gone. You will remember that he said that once when he was out with her and they went by a policeman, Mrs. Henagan had the notion that her father was going to turn her over to the police. Was her father responsible for that delusion? The fact that the circum- [228] stances were such that he took her in the presence of the police were not, or so you might think, the legal cause in whole or in part of the delusion which Mrs. Henagan had. There was a preexisting condition which led her to incorporate a quite innocent and irrelevant circumstance into a pattern which she constructed.

Now of course, if that is the situation with respect to this death of Mrs. Montell and the engineer's action in

pulling the brake, the mere fact that she incorporated into her mind these circumstances does not mean that the plaintiff has shown that the railroad and its employees were the cause in whole or in part of the delusions which she had.

On the other hand, if you find that prior to the accident Mrs. Henagan was of an unstable mind but not one which in any way would unfit her to do her job, and it was the conduct of the railroad employee that acted as a cause or trigger which brought about the situation that would not otherwise have existed; if the railroad employees, or one of them, by their negligence were a partial cause of the mental condition of the plaintiff, then you may find, and under those circumstances should find, that the railroad was the legal cause under the applicable Act of Congress. The plaintiff has the burden of proving to you, not merely that the insanity followed the events of 7.55 a.m. October 11, 1954, in Providence, but that those events were at least in part [229] the cause, not the mere accompaniment, of the onset of the plaintiff's mental condition.

Now, Mr. Foreman and Members of the Jury, if you are satisfied that the plaintiff has met the burden of proof with respect to the issue of breach of duty towards the plaintiff, and if you are satisfied that the plaintiff has met the burden of proof with respect to causation, you will then have to address yourself to the question of damages. If the plaintiff has not persuaded you on either of the first two issues or has not persuaded you on both of them, then you never reach the question of damages. But if you do reach the question of damages, what may you properly consider? You may not properly consider any hospital or doctor's bill heretofore incurred. If there were any such bills, they have not been proved and are not before you. However, a portion of the evidence deals

with the suggestion that there will in the future be hospital and doctors' bills. Before you can allow anything on account of future medical bills the plaintiff has to persuade you that the plaintiff will incur such bills. It is not enough that the doctors think it would be a good idea for her to incur them. You must be persuaded that she will incur them, and that those bills are caused in whole or in part by the breach of duty of an employee or agent of the railroad.

[230] So far as concerns pain and suffering, if you find that there was a breach of duty and the breach of duty was the cause in whole or in part of the plaintiff's injury, you may and should allow on account of pain and suffering heretofore and hereafter sustained as a consequence of the breach of duty. Most of you have sat on other cases involving pain and suffering. By now you are at least as great experts as the Court, and I am not going to try to tell you what to do with respect to this item if you reach it.

A third element of damage which is claimed by the plaintiff is diminution of earning capacity. Diminution of earning capacity is always peculiar to the particular plaintiff. You have a right to know, and you here have been told, what her annual, monthly, weekly earnings were. You will have before you Exhibits 7-A and 7-B; and Mr. Kelleher has quite rightly read out to you a figure of $2,451 more or less as the earnings from January 1, 1954, to October 11, 1954.

And then he has invited you to consider the plaintiff's life expectancy. Unfortunately, as we all know, with the exception of federal judges and a few others, life expectancy is not the same as earning capacity as you grow older. There are some people who when they are seventy don't earn as much as they do when they are forty-one. And you are entitled to take into account that the plaintiff

was a waitress on a railroad, and you know, and if you doubted it you saw the [231] hostess on the railroad, that it is not merely skill which results in people being hired as waitresses and hostesses on restaurant cars. Moreover, needless to say—and, indeed, Mr. Kelleher mentioned this in his argument—if you allow something for future payment that would have been earned, you do not allow it at 100 per cent because you take a discount due to immediate payment instead of distant payment. It would be convenient for all of us to be paid today a thousand dollars rather than to be paid ten years from now. A thousand dollars in the hand is worth more than two thousand dollars in the future if the future be far enough off.

Mr. Foreman, and Members of the Jury, you will take with you into the jury room the pleadings, and I have already noted that the pleadings have been amended and I have allowed the amendment, but I haven't suggested that the so-called ad damnum, the amount sought, is either a limited ceiling, or a floor, or anything else. It's just one of those bits of traditional dressings which go with a complaint, and which represent some lawyer's or some secretary's notion of what ought to go in there, but the figure is not binding in any way upon the jury.

You will take with you the written exhibits and the photographs. You do not take with you the oral testimony but that does not mean that the oral testimony is entitled to less weight. It is entirely up to you to decide in a case like [232] this what weight to give to each piece of testimony.

You are the judges of the credibility of the witnesses and of the facts stated by them. Anything which I have said about a fact you may and should disregard because you are the judges of the facts. Anything the lawyers have said about the facts you may, and perhaps they would say

should, disregard, except as indicia, pointers, indicators which may help you refresh your recollection.

At the outset I spoke of tragedy in this case. You have sat here long enough to know that most cases which come before a court and jury involve in some aspect a tragedy or a calamity. But you and I are sworn to apply the law, and if you approach this case in that spirit, imagine that you yourselves some day were either a plaintiff or a defendant and you hoped that you would have twelve men as good and true as yourselves, you would want them, hard as it is, to try to ascertain what are the facts. Heaven forbid that any of you be insane or injured! Heaven forbid that any of you should be driving something which is involved in an accident! But you know perfectly well that if you were in such a case, interested as you would be in the money you might recover or the money you might have to pay, you would be even more concerned about twelve men's determination of your integrity, veracity, reliability. That is what would ultimately interest you, and that is what your function as jurors is [233] to ascertain.

You will go to lunch at 12 o'clock, and when you reenter the court with your verdict I will take it. If counsel wish to be here that's up to them, they won't be sent for.

. . . . . .

Defendant's Motion for a Directed Verdict.

[Filed January 7, 1959.]

Now comes the defendant in the above-entitled action and respectfully requests the Court to rule that upon the pleadings and upon all the law and the evidence the plaintiff is not entitled to recover, and therefore moves that a verdict be directed in favor of the defendant on the following ground:

1. That the evidence is not sufficient as a matter of law to warrant a finding that the defendant was negligent.

By its Attorney,
NOEL W. DEERING

Denied
WYZANSKI, *J.*
Jan. 7, 1959.

[Endorsed on carbon on file in court.]

This motion was presented to the Court before the case went to the jury. The judge waved aside the motion and said it was "denied" but the denial was not meant to be final, but merely meant that the judge would refuse to act upon it until after the jury returned its verdict. The jury having returned its verdict, this judge would grant the motion were he free so to do. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States, and solely in response to such command, this Court denies the motion.

WYZANSKI, J.
Jan 13, 1959.

Judgment.

WYZANSKI, J. After trial and in accordance with the verdict of the jury, it is ORDERED plaintiff, Mary L. Donnelly Henagan to recover from the defendant, The New York, New Haven & Hartford Railroad Company the sum of $30,000.00 and costs taxed at $

By the Court,

MIRIAM M. WYNN
--Deputy Clerk.

WYZANSKI, U. S. D. J.

Judgment entered January 8, 1959

Motion for Judgment Notwithstanding Verdict and Motion for a New Trial.

[Filed January 12, 1959.]

Now comes the defendant and moves that the verdict and judgment heretofore entered in the above-entitled action for the plaintiff be set aside and that judgment be entered for the defendant in accordance with the previous motion for directed verdict now of record in this Court.

And in the alternative the defendant moves that the verdict herein be set aside and a new trial granted on the following grounds:

1. That the verdict is contrary to the evidence and against the weight of the evidence;

2. That the verdict is against the law applicable to the evidence;

3. That the amount of damages is excessive.

THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY
By: NOEL W. DEERING
its Attorney

This motion would be granted by this Court were it free to do so. But this Court construes the opinions and judgments of the Supreme Court of the United States as giving him no option but to deny the motion?

WYZANSKI J.

Jan. 13, 1959.

Hearing before Wyzanski, D.J., on January 13, 1959.

. . . . . .

[10] I am denying both motions. On the Defendant's Motion for Directed Verdict I have endorsed this: "This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was 'denied' but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free so to do. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959."

On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: "This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959."

I wish to be a little more explicit than I am in these endorsements. In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence of

negligence. [11] But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do of not.

With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954. In my opinion every medical practitioner of any competence would say that the kind of condition which the plaintiff now has owes its origin to factors far antecedent to the 11th of October. It may be that what happened on the 11th of October acted as a trigger, but in my view not as a legal cause. It seems to me to be as irrelevant from the point of view of causation as if on that day the rain suddenly started to dash against the windows and the plaintiff became frightened. There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion.

Mr. Kelleher. Your Honor and I differ on many things. [12] The Court. But you must admit I am a lawful judge in the sense that I didn't do anything except follow the command. Whatever my personal views are, I hope that I am externally obedient to my betters.

Notice of Appeal.

[Filed February 11, 1959.]

Notice is hereby given that The New York, New Haven and Hartford Railroad Company, the defendant above-named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered and filed herein on January 8, 1959.

By its Attorney,

NOEL W. DEERING

Dated: Boston, Massachusetts February 11, 1959

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 709

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

MARY L. DONNELLY HENAGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1960
CERTIORARI GRANTED MAY 2, 1960

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[fol. 137a]

IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

v.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

Record Appendix to Brief for Defendant, Appellant

Exhibits.

If the exhibits had been inserted in serial order they would have been in awkward positions for examination (particularly Exhibits 1 and 1A, which are folded).

For grgater convenience of the court the exhibits have been bound in the following order:

Plaintiff's Exhibit 2A.

Plaintiff's Exhibit 2B.

Plaintiff's Exhibit 2C.

Plaintiff's Exhibit 2D.

Plaintiff's Exhibit 2E.

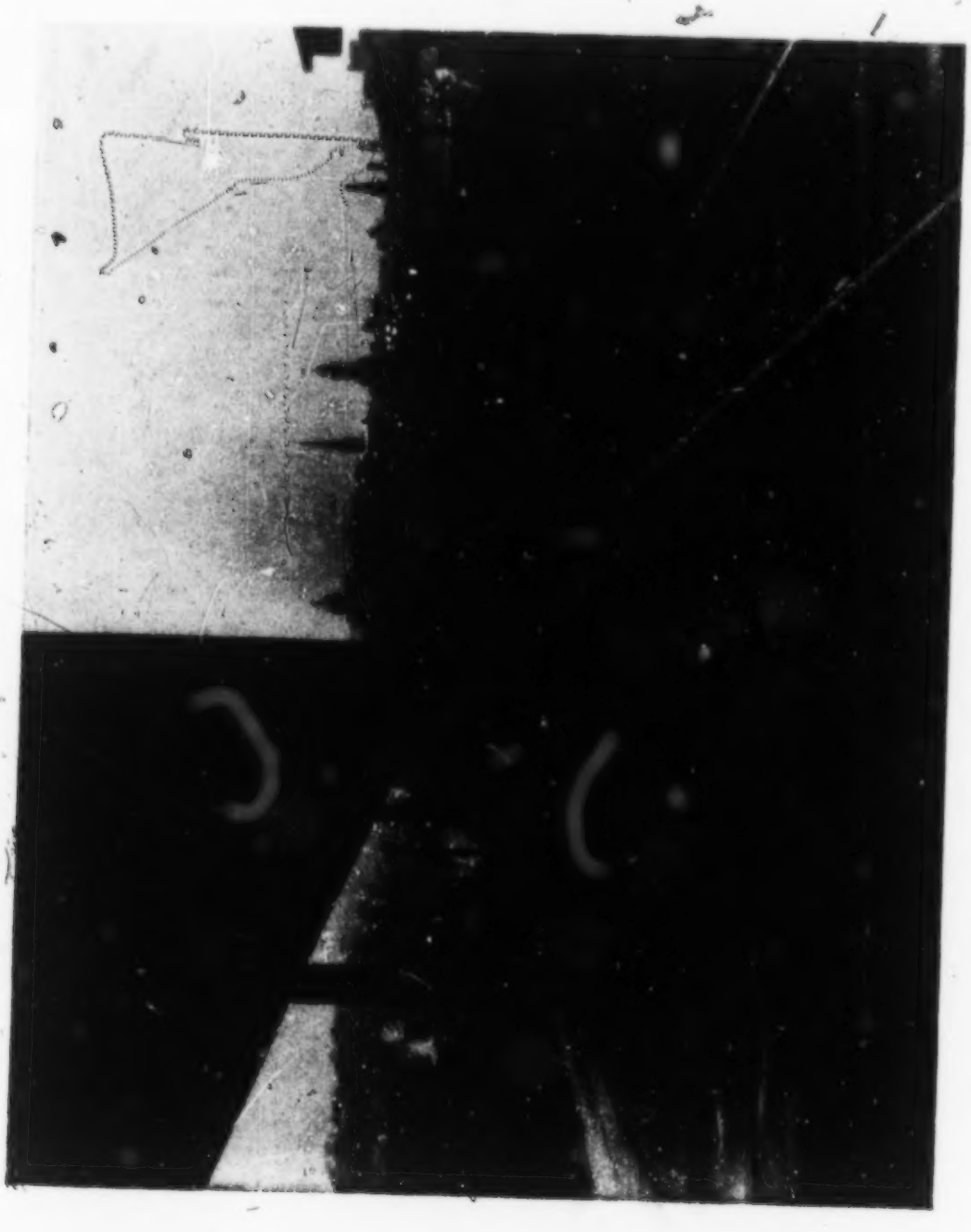
Plaintiff's Exhibit 2F.

Plaintiff's Exhibit 3.

Plaintiff's Exhibit 1A.

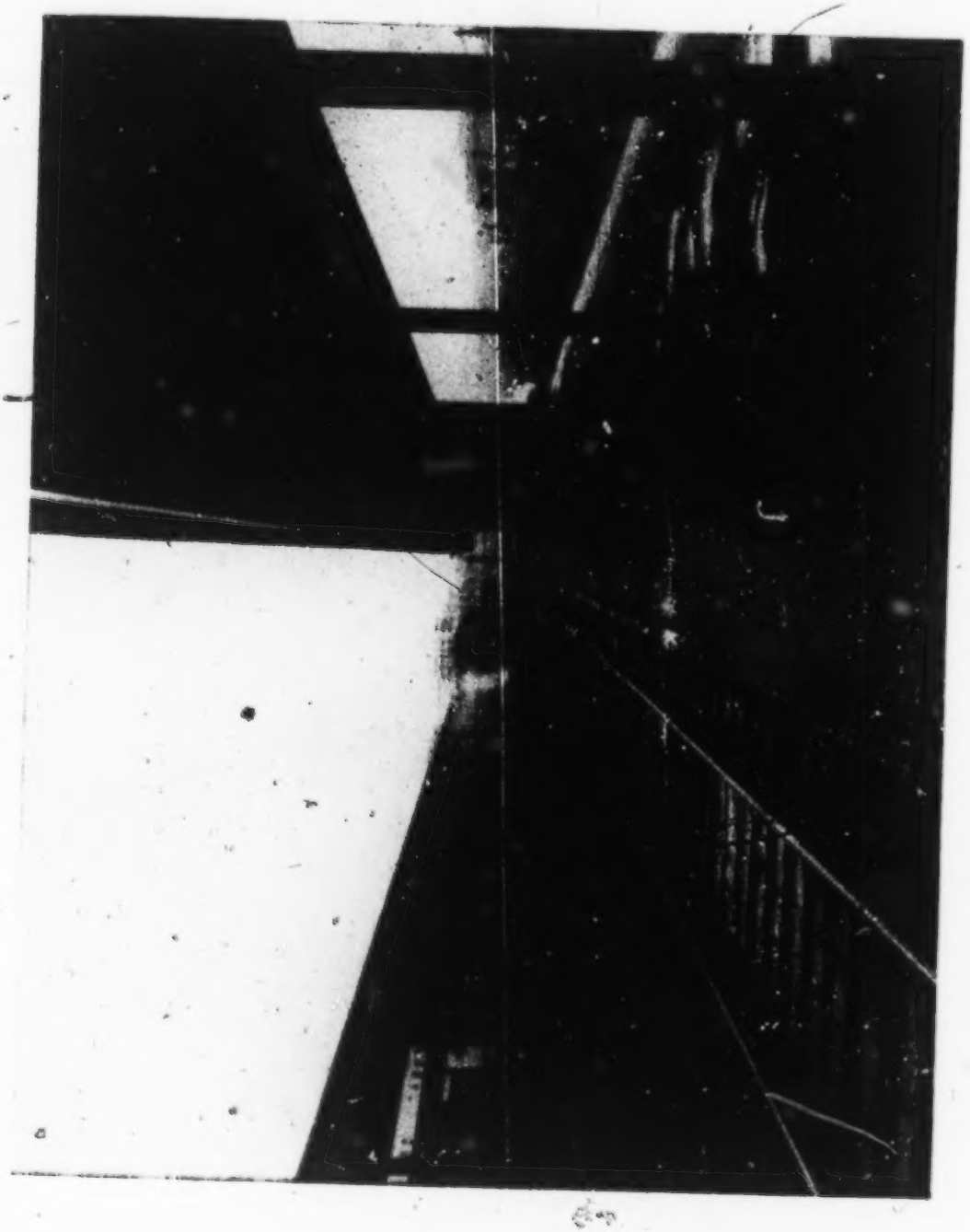
Plaintiff's Exhibit 1.

Plaintiff's Exhibit 2A.



Plaintiff's Exhibit 2B.

Plaintiff's Exhibit 2C.



Plaintiff's Exhibit 2D.

ST.

LINE

BITUMINOUS PLATFORM

TO NEW LONDON

TRACK #3

T. SHELTE

WOOD PICKET FENC

GASPEE

EAST

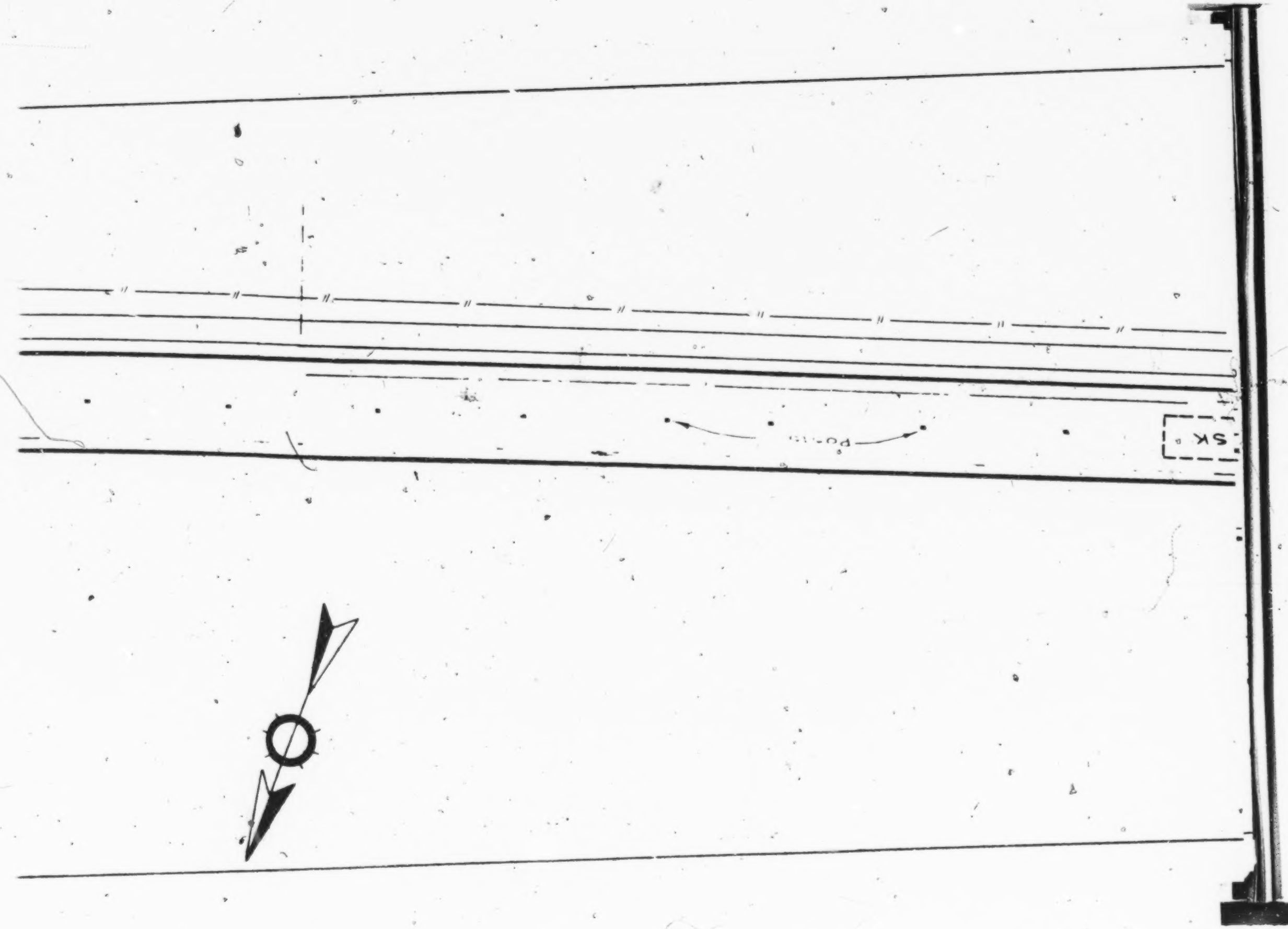
T. SHELTER

KIOSK

KIOSK

OOD PICKET FENCE

GATE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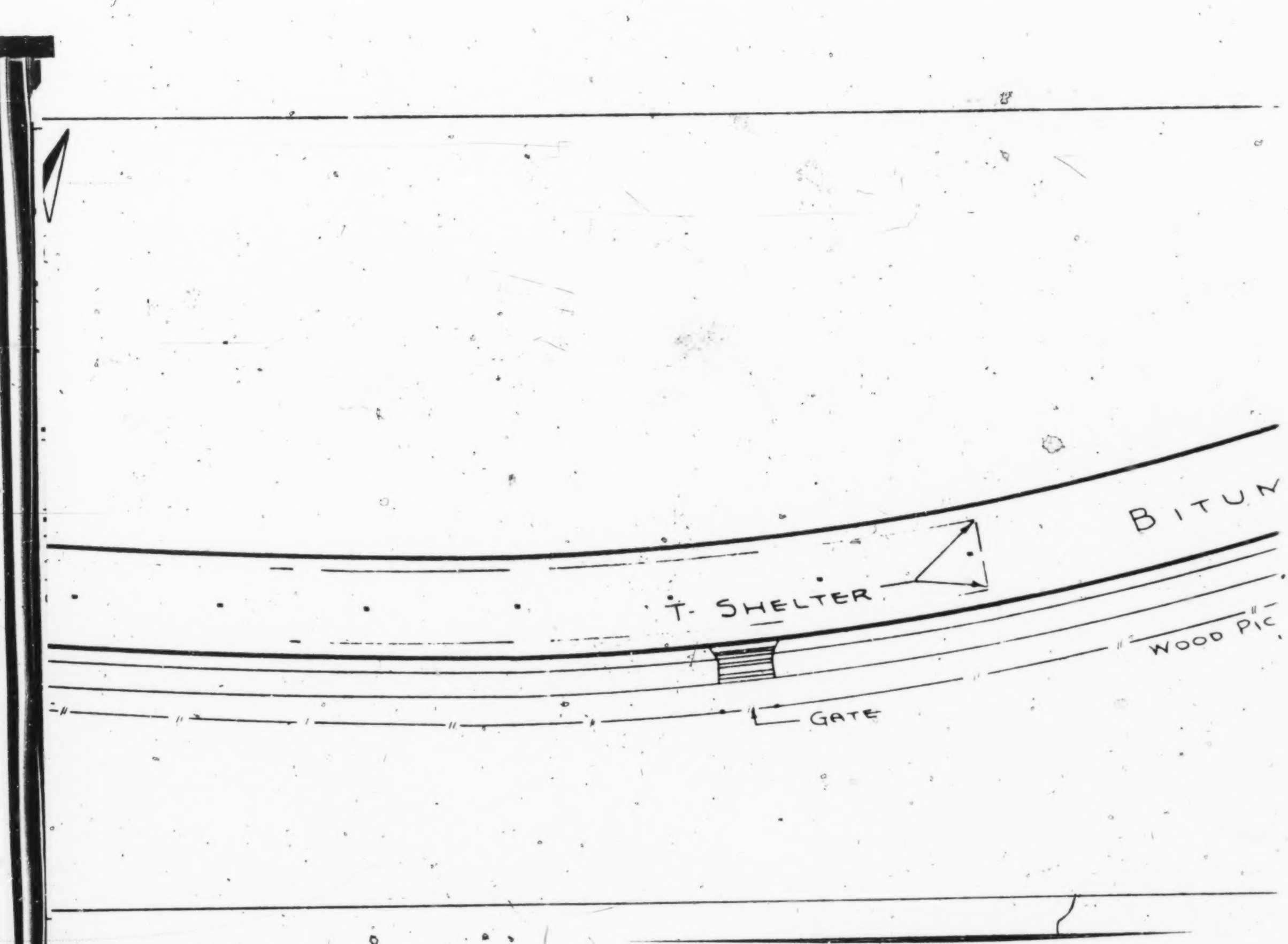
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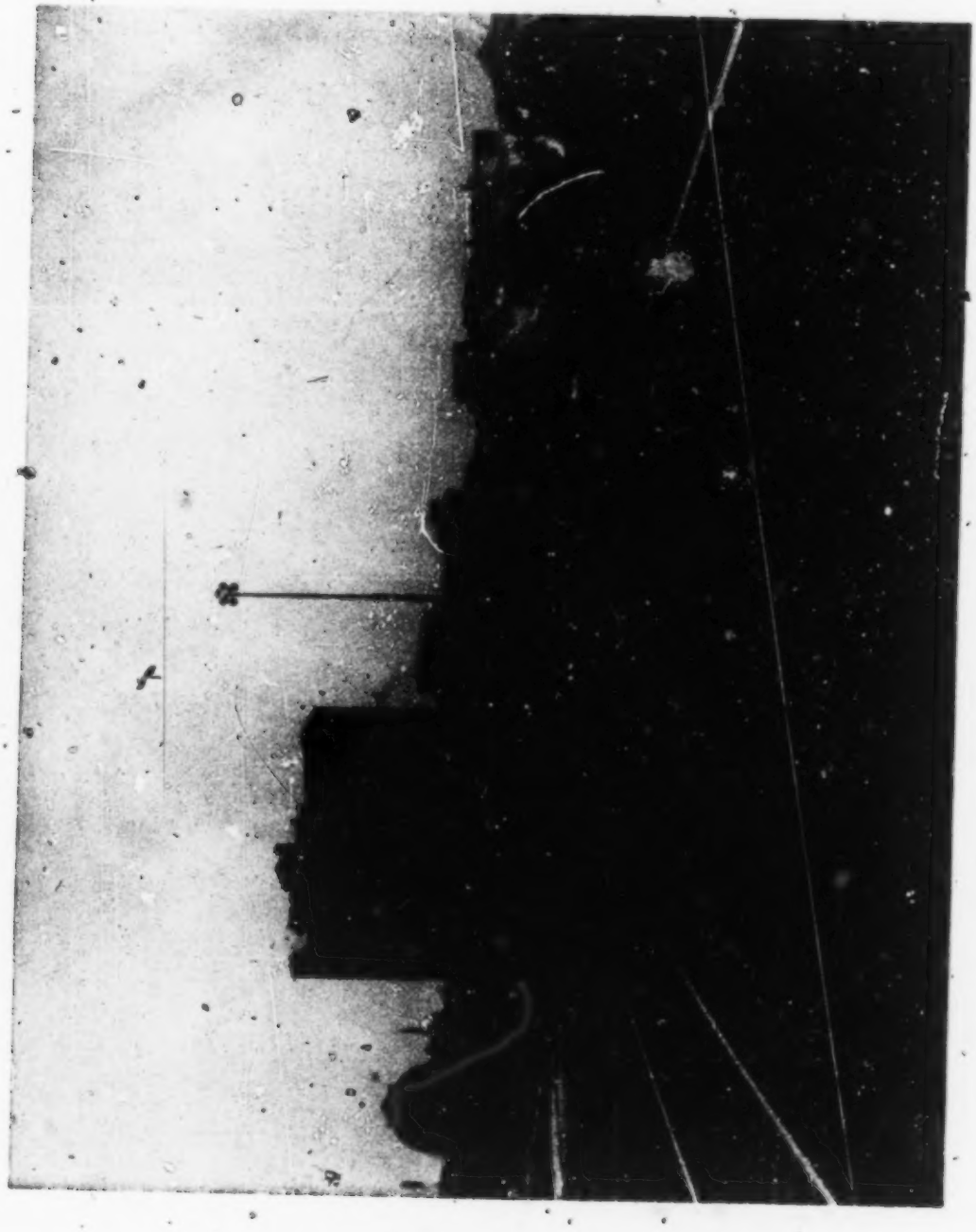
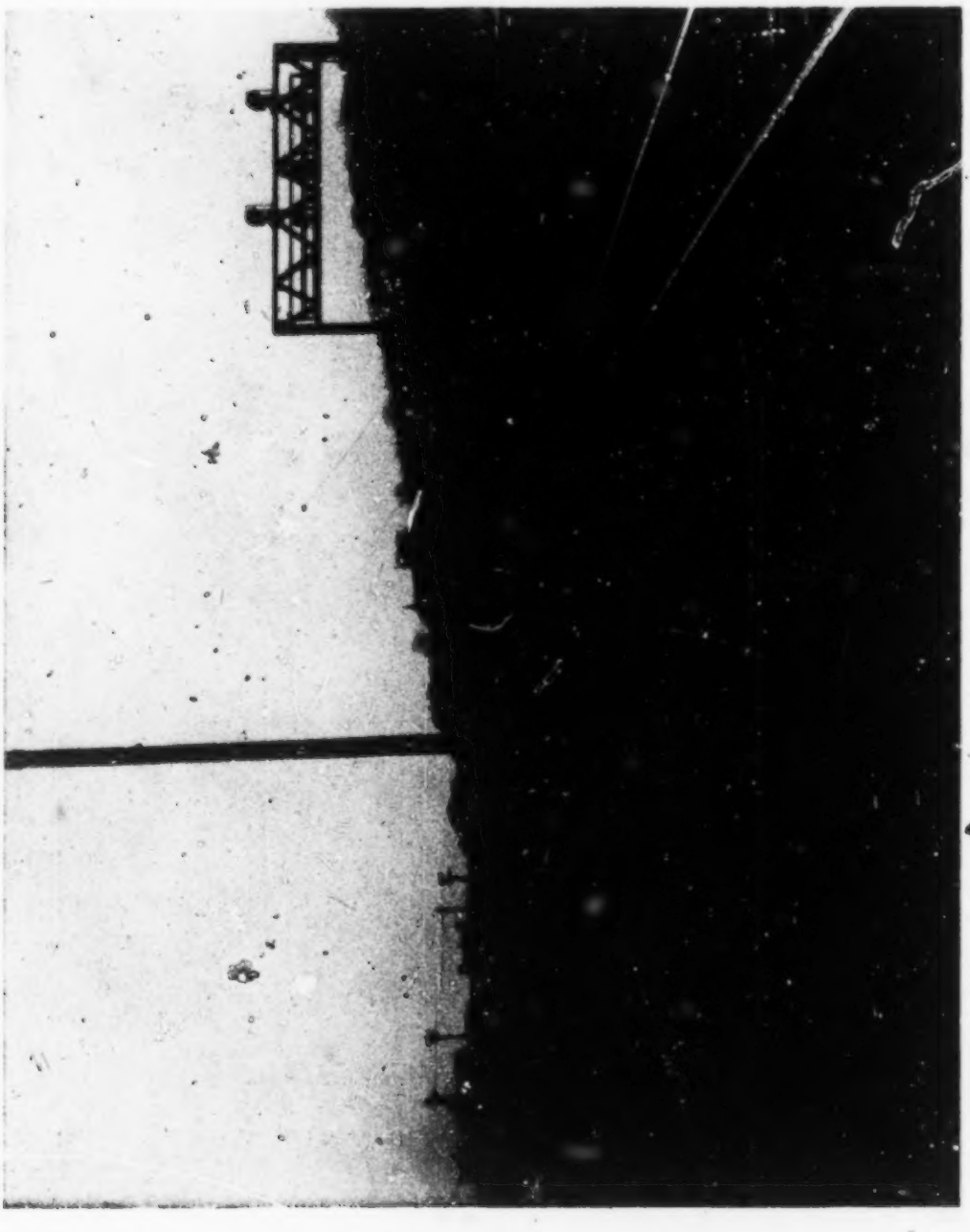
T. SHELTER
WOOD PIC
GATE

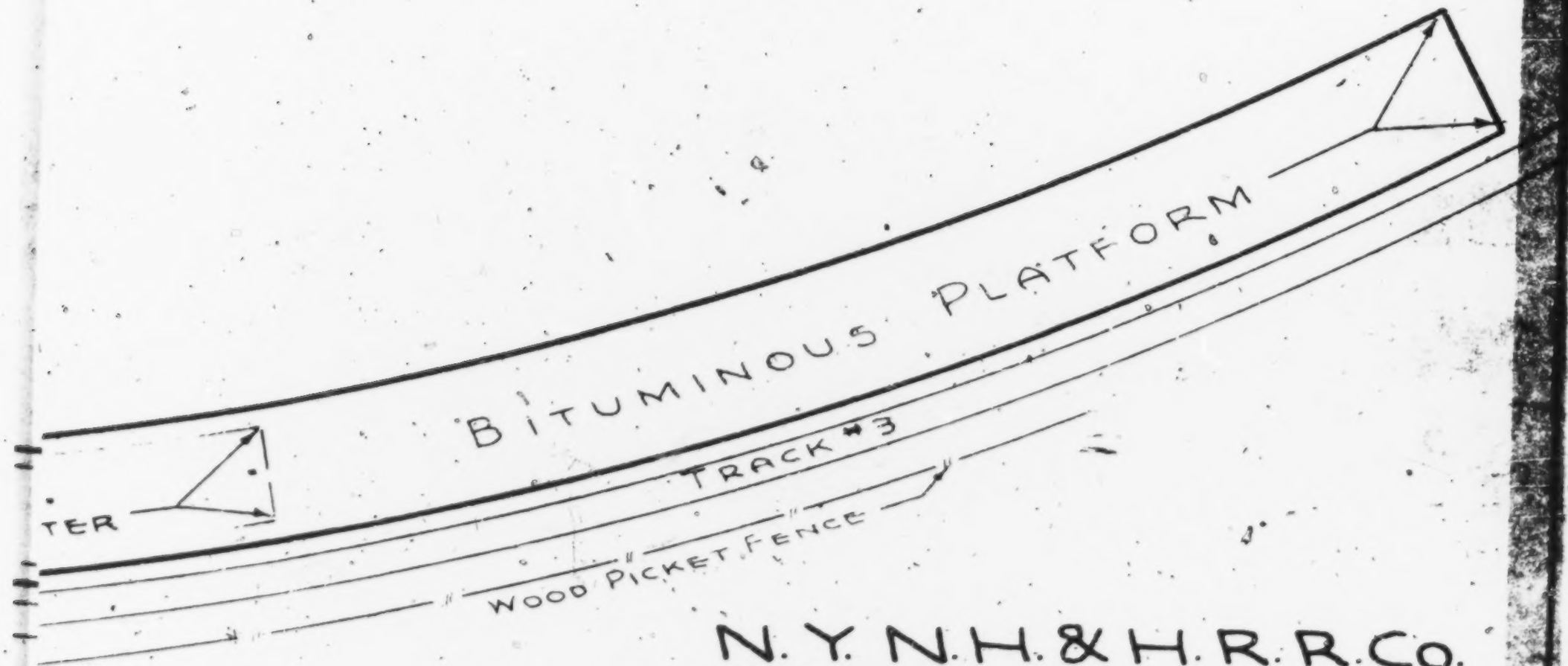
Plaintiff's Exhibit 2E.



Plaintiff's Exhibit 2F.



Plaintiff's Exhibit 3.



N. Y. N. H. & H. R. R. Co.

BOSTON DIVISION MAIN LINE

PLAN SHOWING PORTION OF TRACK #3 & PLATFORM UNION STATION PROVIDENCE, RHODE ISLAND

SCALE 1" = 20'

SURVEY BY AEF "BK"

← To New London

YARD "17

STREET

TK 11

TK 9

TK 7

TK 5

TK 3

TK 1

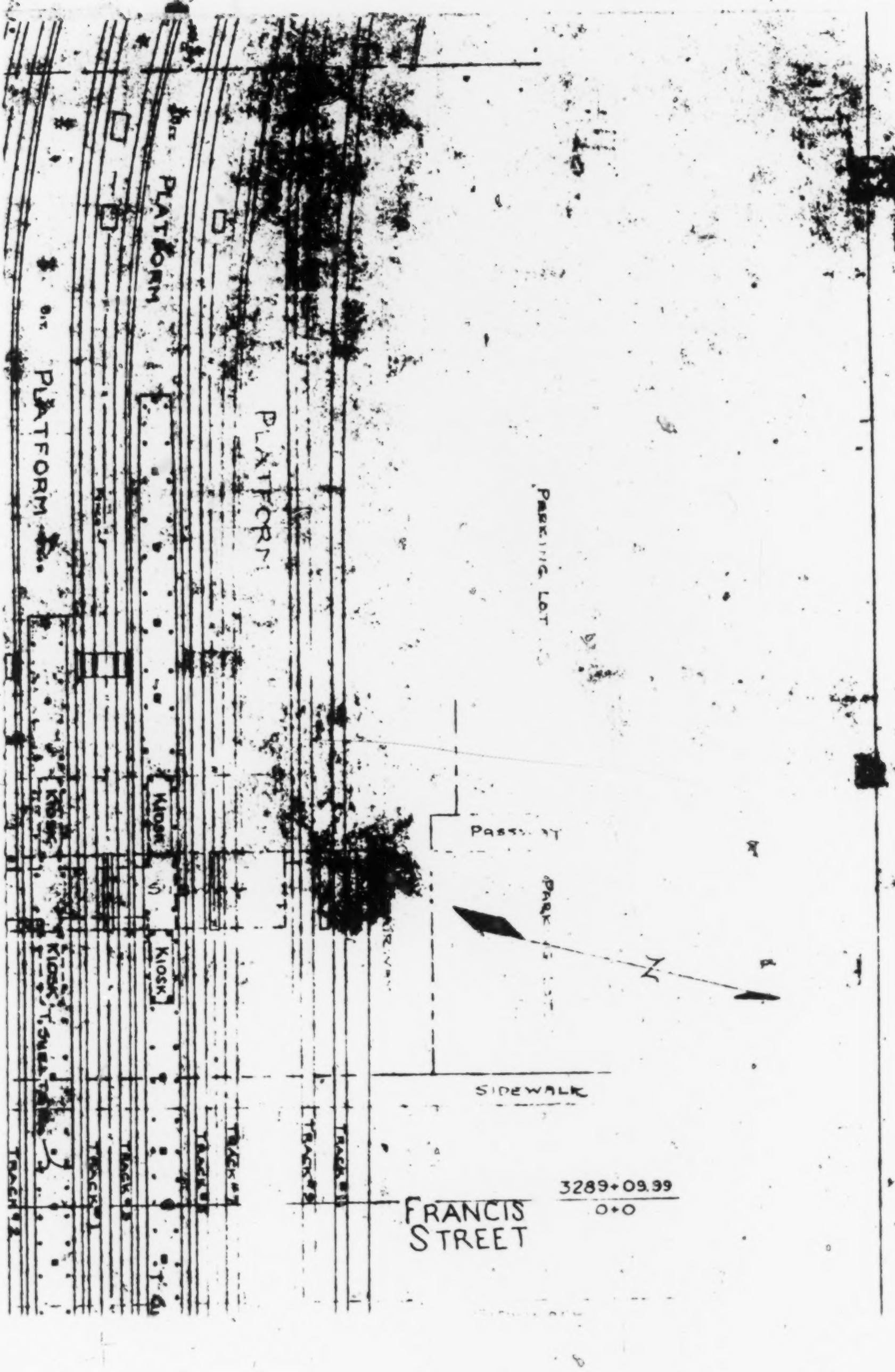
5 Sw

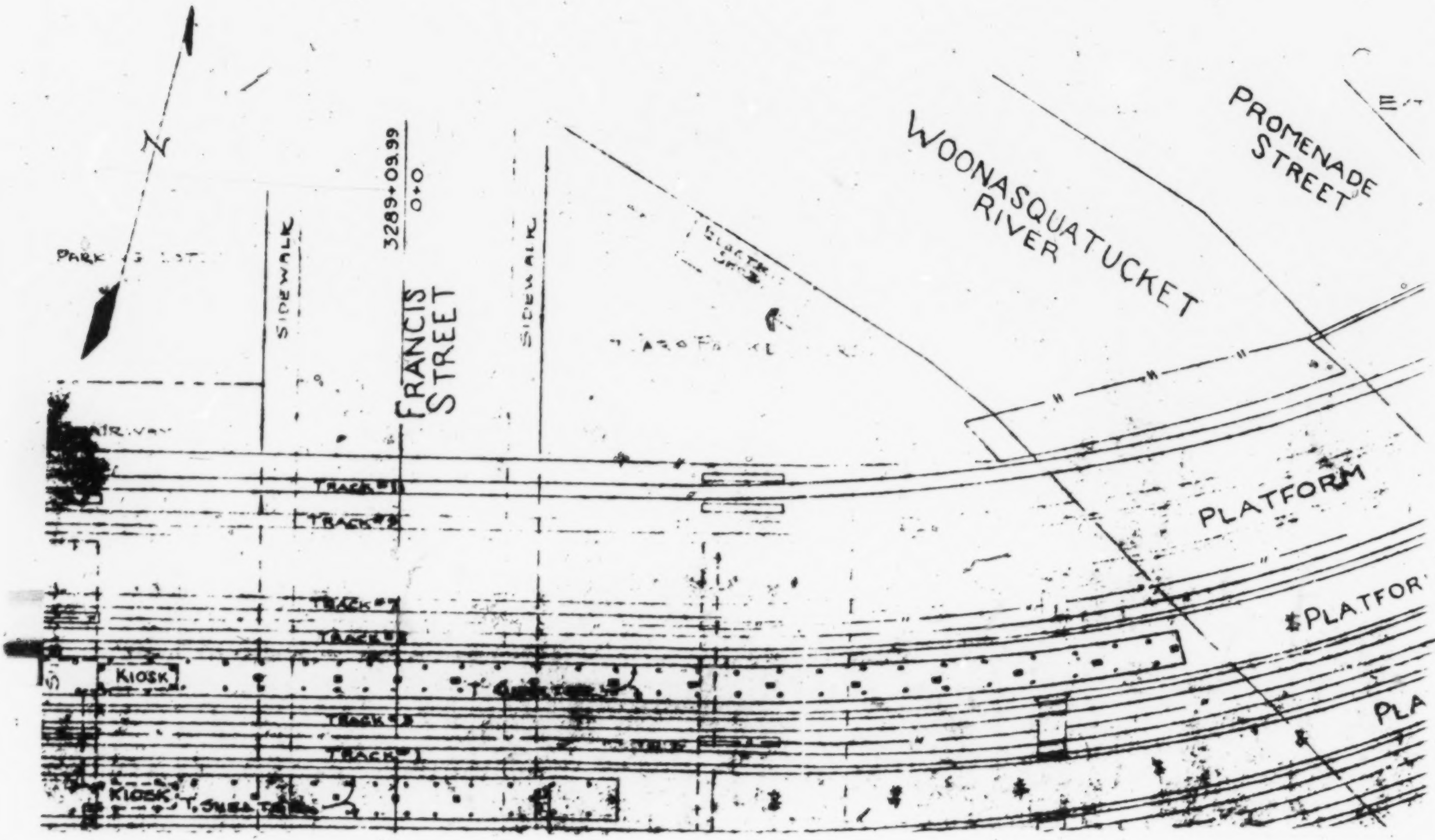
WATER HOSE RACK

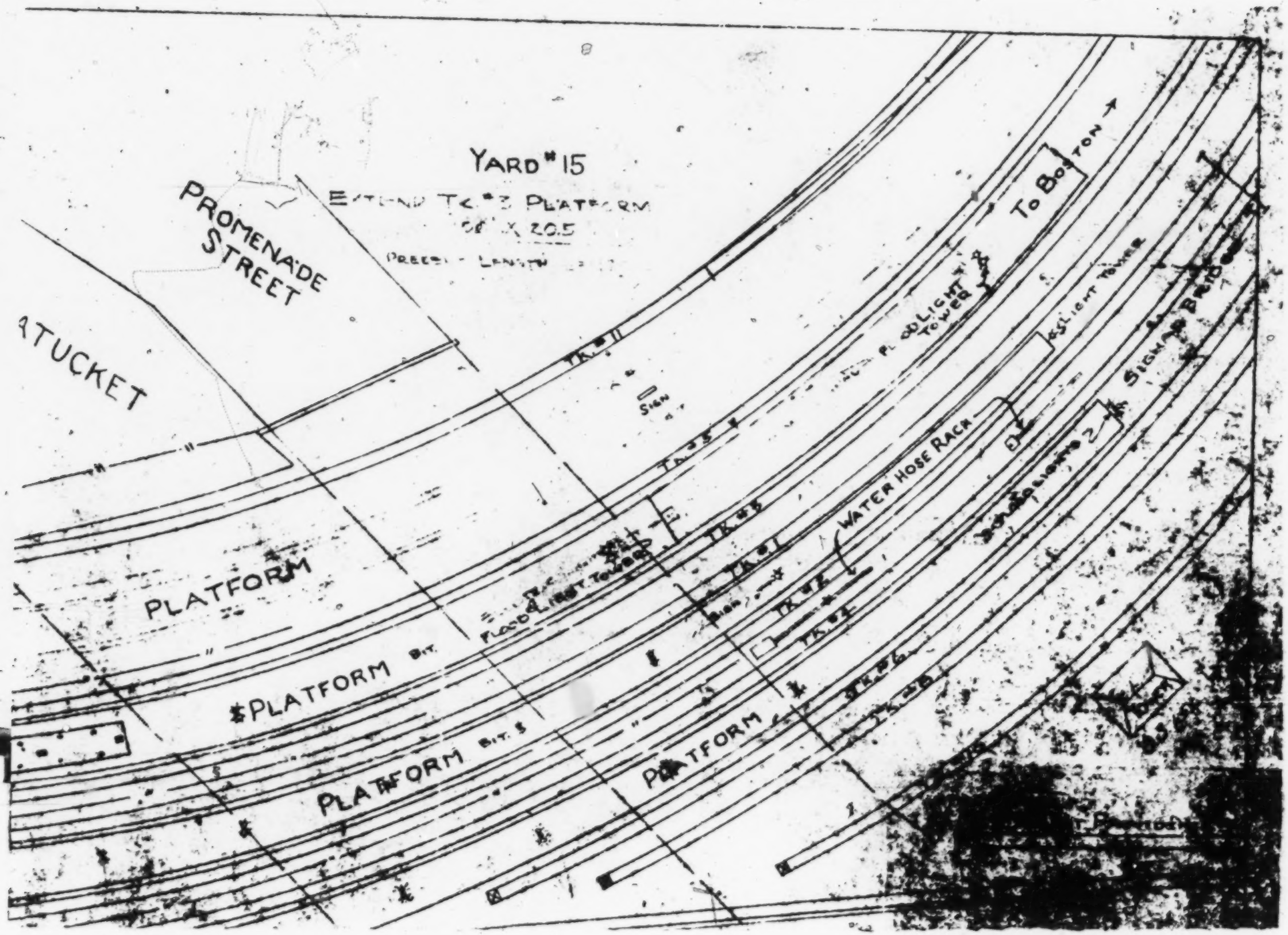
FLOOD LIGHT TOWER

3 FLOOD LIGHTS

PLATFORM


PLATFORM
PLATFORM
PLATFORM
PARKING LOT
KIOSK
KIOSK
KIOSK
KIOSK
SIDEWALK
TRACK 1
TRACK 2
TRACK 3
TRACK 4
TRACK 5
TRACK 6
FRANCIS STREET
3289+09.99
0+0


PARK
SIDEWALK
3289+09.99
0+0
FRANCIS STREET
SIDEWALK
WOONASQUATUCKET RIVER
PROMENADE STREET
PLATFORM
TRACK #1
TRACK #2
TRACK #3
TRACK #4
TRACK #5
KIOSK
KIOSK


YARD # 15
PROMENADE STREET
ATUCKET
PLATFORM
PLATFORM
PLATFORM
To Boston
SIGNAL BRD
WATER HOSE RACK
FLOOD LIGHT TOWER
SIGN

YARD 12

NOTE:

OVERHEAD LIGHTS FLUSH IN ROOF OF T-SHELTER

TWO LIGHTS ON POST IN PLATFORM

3 FLOOD LIGHTS ON TOWER

PLA

PLA

SPE

OFFICE

WEST AF

PLATFORM

PLATFORM

PLATFORM

KIOSK

KIOSK

SHELTER

SUBWAY

OFFICE BUILDING

WEST COURT

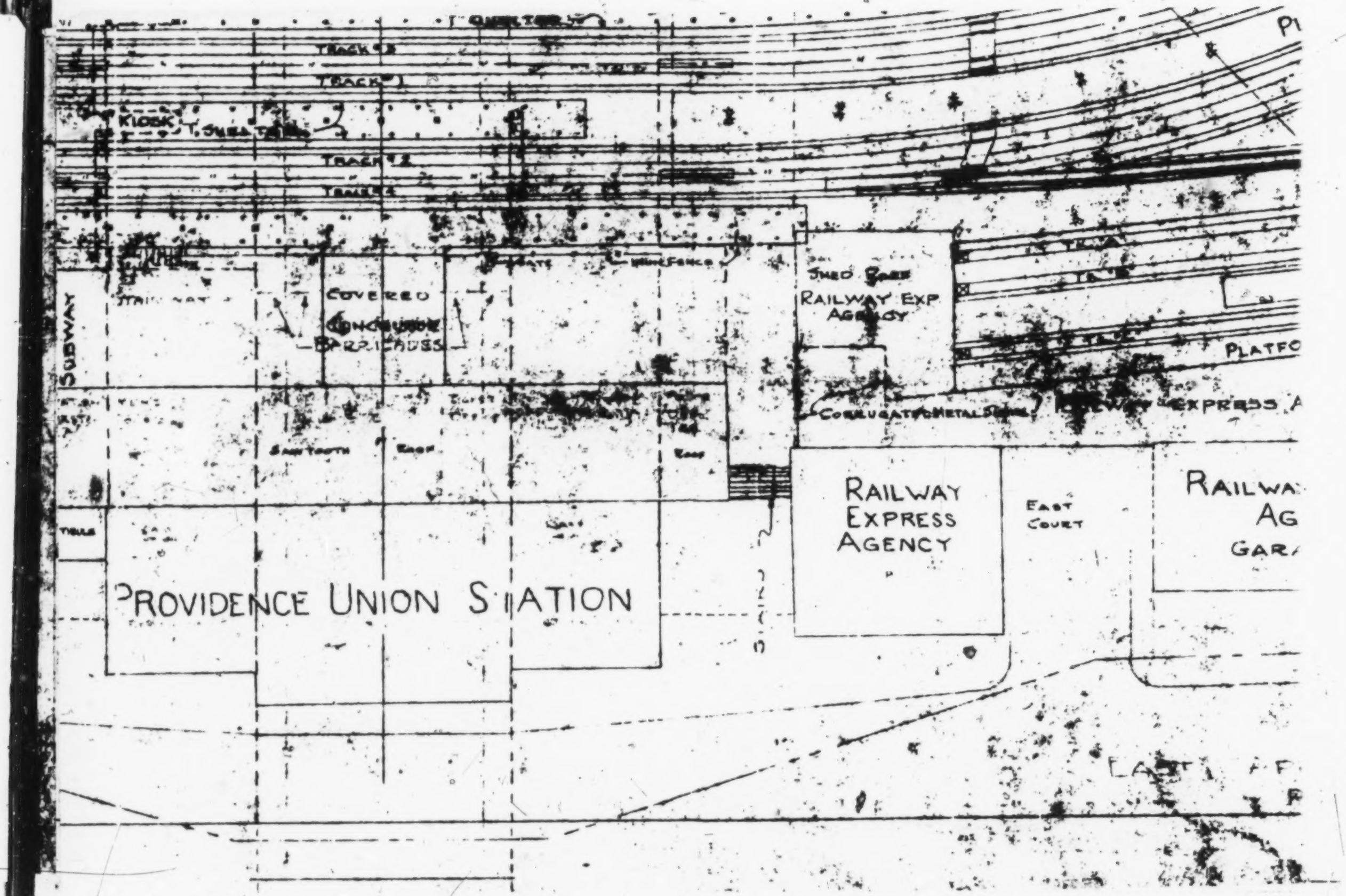
FORMER RESTAURANT BUILDING

STAIRS

VESTIBULE

PROVIDENCE UN

WEST APP. DACH


TRACK 3
TRACK 2
TRACK 1
KIOSK
COVERED
CONCOURSE
BARRIERS
SUBWAY
SAWTOOTH ROOF
RAILWAY EXP AGENCY
CORRUGATED METAL SIDING
EXPRESS
PLATFO
RAILWAY EXPRESS AGENCY
EAST COURT
RAILWA
AG
GAR
PROVIDENCE UNION STATION

PLATFORM

PLATFORM

CANOPY

PLATFORM

CANOPY

PLATFORM

COVERSHED OVER MAIL PLATFORM

RAMP

EXPRESS AGENCY

EAST COURT

RAILWAY EXPRESS AGENCY GARAGE

N.Y. N.H. & H. R.R. CO.

PROVIDENCE DIVISION — MAINTENANCE

TRACKS – UNION STATION

PROVIDENCE, R.I.

SCALE 1"=40'

PROPOSED TRACK #3

PROPOSED ENCLOSURE FOR MECHANICAL

[fol. 155]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Record Appendix to Brief for Appellee

STENOGRAPHIC RECORD OF TESTIMONY

* * * * * * *

Mr. Kelleher: It is agreed that as of the day of the accident the plaintiff had a life expectancy as shown by Standard Tables of Mortality of 34.6 years.

The Court: 34.6 years. It is what the Standard Tables of Mortality show is the life expectancy of a wife, woman, a citizen of the United States who on October 11, 1954 was 41 years old.

* * * * * * *

The Court: Mary L. Donnelly Hennegan v. New York, New Haven & Hartford Railroad Company. Motion for new trial and also a motion for judgment notwithstanding the verdict, both being combined. I am perfectly willing to listen to you. I think you ought not spend too much time on it because I am going to make a very strong statement. I can't see how I can grant your motion.

Mr. Deering: Well, may it please the Court, I would like to urge, first, the motion for judgment notwithstanding the verdict. That is based entirely upon the case of Herdman against the Pennsylvania Railroad in 252 U.S. at Page 518. My citation is wrong. It is 352.

* * * * * * *

Mr. Deering: That case is very interesting, your Honor, and I would like to make a comment or two about it, not only because of its similarity to the facts in this case. There a freight train made a very sudden stop to avoid hitting an automobile at a grade crossing, and the conductor who was in the caboose was injured as a result of the sudden stop. The Circuit Court in the Six Circuit in 228 Fed. 2d at 902 said:

[fol. 156] "We think the District Judge correctly performed his duty in directing a verdict for the appellee.

There was a complete absence of probative facts to support the conclusion of negligence."

In that case the Supreme Court granted certiorari, and it went up with a group of other cases, which of course your Honor is familiar with. There was the Rogers case. There was an opinion written by Mr. Justice Brennan shortly after he went on the Court, and I think he outdid some of the opinions, perhaps, written by Mr. Justice Black and Mr. Justice Douglas earlier. Interestingly enough, Mr. Justice Brennan wrote this opinion sustaining the Circuit Court and the Court below in directing the verdict for the defendant. It seems that if there is a hole in the armor which the Court has set up around the directing of verdicts in Federal Act cases that this is it, that the Court reached this point and refused to say that it was negligence for an engineer of a train to make a sudden stop when met with an emergency, as in this case —in the Herdman case an automobile coming upon the track, and here we have the woman coming upon the track.

The Court: You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier.

Mr. Deering: And I think I argued to the jury that if he had seen her that moment earlier when she had been on the platform standing in a position of safety that he would have had no reason to have believed that she was going out on the track until she made that movement toward the track, which might have been a momentary movement, probably a fraction of a second, and he would have done exactly the same thing had he seen her walking [fol. 157] from the platform towards the track that he did when he saw her actually stepping on to the track.

The Court: You persuaded the thirteenth juror but not the twelve.

Mr. Deering: Well, I think that in that situation—it is not a situation of this kind, it is not a question of fact for the jury to pass upon but is a question of fact—not a question of fact but a question of law for the Court to

rule, as the Court did in the Herdman case, that the plaintiff had not sustained the burden of proving negligence.

* * * * * * *

Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.

The Court: This is a perfect case which I would be very happy to see nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.

Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that it is all the stronger case for a Motion for a New Trial because I think it is apparent that the jury in this case disregarded the law as given by your H[illegible]r.

The Court: I cannot say that. I can only say that if this were a case in which a verdict was permissible for the plaintiff, then I don't think they disregarded my instructions. I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but I am not going to help you much here.

Mr. Deering: Well, then perhaps in view of that there is no need for me to continue further.

* * * * * * *

[fol. 158]

PLAINTIFF'S EXHIBIT 6

PETER BENT BRIGHAM HOSPITAL

DISCHARGE NOTE

Address: 21 Belvedere Street, Boston, Massachusetts

Date of Admission: Oct. 11, 1954.

Date of Discharge: Oct. 28, 1954.

Condition on Discharge:

Improved [ ] Unimproved [ ]
Discharged against advice [ ] Deceased [ ]

Disposition:

Staff Member: Dr. Henry Banks, P.B.B.H.

Family Physician:

Address:

Out-Patient Department Appointment Date:

Follow-Up Clinic Appointment Date:

Special Clinic Appointment Date:

Medical Examiner:

Accepted [ ] Refused [ ] No jurisdiction [ ]

Autopsy permission obtained by refused to

Significant history, physical examination, laboratory data, roentgen findings, hospital course and therapy. Recommended therapy.

HISTORY:

This was the first P.B.B.H. admission of this 37-year-old white female, N.H. Railroad attendant, who entered with the chief complaint of pain in her neck and left shoulder of one hour's duration. One hour prior to admission, the patient was working on a New Haven train as it left Providence, it suddenly made an emer-

gency stop. She was standing in the grille car and allegedly was tossed about in a manner which twisted her neck. Details of the accident are not obtainable from the patient. The patient noticed immediate pain [fol. 159] down the back of her head and between her shoulders, and was unable to move her neck or back without pain. Later in the day she developed pain in her left shoulder and limitation of motion in her left shoulder. She spent the afternoon in the OPD sedated heavily and because of a hysterical reaction, the patient is very vague and uncooperative.

PHYSICAL EXAMINATION:

This is a w.d., w.n. white female lying supine in bed with her head and left shoulder held immobile. She is in no acute pain but is extremely uncooperative and hysterical. B.P. 118/65, P. 76, T. 100, R. 22. There was some tenderness over C-6 and C-7. She is unable to rotate her neck because of pain and there was no swelling or redness seen anywhere, in her neck. The patient did not see any reason for an abdominal examination and refused it as did she refuse a pelvic examination. There was tenderness over the left deltoid and trapezius with greatest tenderness over the acromium and anterior shoulder joint. No deformity was seen. The patient flexed the left humerus 30 degrees and abducted it 90 degrees, and extends it 30 degrees before pain limits motion. Her other extremities were normal.

LABORATORY DATA:

Hinton negative. Blood group A Rh-positive. Urinalysis on admission showed 4-5 w.b.c. in the sediment. Hematocrit was 46, W.B.C. 10,800 with 80% polys. X-rays of her ribs, left shoulder, internal rotation and external rotation, and multiple views of the cervical spine failed to demonstrate any fracture or dislocation or other abnormality.

HOSPITAL COURSE:

The patient was placed in Sayer head traction and [fol. 160] heavily sedated during her stay. On the 16th hospital day, the patient was taken out of head traction having vastly improved and put into a Thomas collar with which she was discharged on the 18th hospital day.

DIAGNOSIS: Acute neck strain.
Hysterical reaction.

OPERATIONS: None.

COMPLICATIONS: None.

MEDICATIONS: None.

DISPOSITION: Home to be followed by Dr. Henry Banks.

(DR. ROBERT NEWTON)

RN/rh

Signature of Staff Member
responsible for care (s) HENRY BANKS

11/19/54 Disc Summary sent to MR. C. T. CONLEY, N.Y. N.H. & Hartford R.R. Co., South Station, Boston 10, Mass.

List in consecutive order the codified diagnoses, complications, roentgen diagnoses, pathologic diagnoses and operations with anesthesia dates

Diagnosis: 030-43X Acute neck strain
Hysterical reaction

[fol. 161] PETER BENT BRIGHAM HOSPITAL

DISCHARGE NOTE

Address: 21 Belvedere St., Boston.

Date of Admission: 7.12.57.

Date of Discharge 8.3.57.

Condition on Discharge:

Improved [ ] Unimproved [ ]
Discharged [ ] Deceased [ ]
against advice

Disposition:

Staff Member: Doctor Banks, PBBH. (One copy, 8.27.57.)

Family Physician:

Address:

Out-Patient Department Appointment Date:

Follow-Up Clinic Appointment Date:

Special Clinic Appointment Date:

Medical Examiner:

Accepted [ ] Refused [ ] No jurisdiction [ ]

Autopsy permission obtained by refused to

Significant history, physical examination, laboratory data, roentgen findings, hospital course and therapy. Recommended therapy.

HISTORY:

This was the 2nd PBBH admission of this 39-year old, former railroad worker, with chief complaint of cervical radiculitis. Patient suffered a whiplash injury when a train in which she was riding, made a sudden stop, in October '54. She had shoulder and neck pain, tenderness over C 6 and C7 and difficulty with neck and shoulder motions. She was successfully treated at that time with traction and a head collar. Since

then, she has continued to have intermittent complaints which have worsened in the past six months. She now complains of fear of neck movements because of pain, left shoulder pain radiating into the forearm and [fol. 162] paresthesias of the 2-5 digits of left hand and questionable left hand weakness. She was admitted on 7.12.57.

PHYSICAL EXAMINATION:

P. 76: R. normal. BP 140/70: T. normal. Patient was a w.d., w.n., white female in distress from neck pain. Abnormal findings include hypalgesia over the complete hand, from the wrist down, with the exception of the thumb. There was tenderness over C5 and C6 cervical vertebrae and over a 2 x 2 cm. area on the posterior surface of the right trapezius muscle. There was limitation of motion of the neck in flexion, extension and rotation. There was limitation of motion of the left shoulder due to pain.

LABORATORY DATA:

Routine blood and urine studies were within normal range. Sed. Rate was 8 to 15. Xrays of cervical spine revealed it to be within normal limits except for an apparent, slight decrease in flexion. A myelogram with special attention to the cervical spine, was normal. Spinal fluid protein was 70 to 49 mgm.%. 5 RBC were found in spinal fluid.

HOSPITAL COURSE:

Patient was seen in consultation by Doctor Tyler, who felt that patient had a severe disuse syndrome of left shoulder. No definite root lesions were found. Patient's reflexes were all found to be normal. On a second consultation, Doctor Tyler felt that there was no damage to patient's central or peripheral nervous systems. An LP, done at Doctor Tyler's suggestion, revealed opening pressure of 135 mm H_2O, closing pressure of 130 mm. H_2O. Fluid was clear, noncloudy. Queecken-

stadt Test was negative. Patient was seen by Doctor Bering, who suggested a myelogram, as he felt that patient had real disease. Doctor Bojar saw patient [fol. 163] and felt that she had definite hysterical features. He was unable to say definitely how much of patient's complaints were due to neurosis and how much to possible organic disease. After this extensive study by various laboratory tests and Consultants, a diagnosis was made of cervical radiculitis, with a psychosomatic overlay.

Signature of Staff Member
responsible for care (s) HENRY BANKS

List in consecutive order the codified diagnoses, complications, roentgen diagnoses, pathologic diagnoses and operations with anesthesia dates

DIAGNOSIS: Cervical radiculitis, with psychosomatic overlay 97811-190 000-x00

[fol. 164] PETER BENT BRIGHAM HOSPITAL

7/17/57 PSYCHIATRIC NOTE

Miss Donnelly was followed in psychotherapy over a period of about 8 months because of her severe emotional reaction to the incident which dates the onset of the present illness. She had withdrawn completely from all social contact, even avoiding some members of the family. She had become preoccupied with feelings of guilt over fantasied events. Much of this stemmed from her thought that she could have prevented the train from striking the woman who attempted suicide by jumping in front of it. (This is the story related to explain the sudden stopping of the train when she lost her balance and fell.) Dynamically, this aroused repressed feelings of hostility about which she felt guilty. Even today, she feels people think of her as capable of aggressive action. The anxiety related to these feelings led to the escape by withdrawal and isolation. She has at times construed her physical Sx as in-

dicative of the punishment she felt she was to receive for her hostility.

Psychotherapy was discontinued in Oct. 1956, when she had improved to the point that she was able to socialize enough to assist her father in political electioneering in November.

Emotionally, she is still considerably improved on the social level, but it was not possible to develop insight into the dynamics of her guilt feelings with the associated anxiety because of the strong defense of denial.

There are definite hysterical features here, but I have not been able to determine satisfactorily to what extent she has conversion symptoms or to what extent organically determined symptoms have been utilized in the neurosis.

Thank you

(s) S. Bojar

[fol. 165]

PLAINTIFF'S EXHIBIT 7A

N.Y. N.H. & H. R.R. Co.
Mass. Claims Department
Nov. 26, 1954
Boston, Mass.

Mr. J. C. Hildrich,
Mr. G. R. Luxenburger,
Mr. E. T. Conley,
Mr. J. A. Murtaugh.

November 10, 1954

Below please find statement showing time by weeks of earnings made by Mary L. Donnelly employed as Attendant who was injured at Providence, R. I. on October 11, 1954.

1	Week	Ending	10/ 9/54	Amount	70.32
2	"	"	10/ 2/54	"	67.68
3	"	"	9/25/54	"	67.68
4	"	"	9/18/54	"	67.68
5	"	"	9/11/54	"	67.68
6	"	"	9/ 4/54	"	85.07
7	"	"	8/28/54	"	65.28

8	Week	Ending	8/21/54	Amount	66.18
9	"	"	8/14/54	"	65.28
10	"	"	8/ 7/54	"	65.28
11	"	"	7/31/54	"	65.28
12	"	"	7/24/54	"	65.28
13	"	"	7/17/54	"	65.28
14	"	"	7/10/54	"	54.40
15	"	"	7/ 3/54	"	54.97
16	"	"	6/26/54	"	65.28
17	"	"	6/19/54	"	65.28
18	"	"	6/12/54	"	65.28
19	"	"	6/ 5/54	"	68.68
20	"	"	5/29/54	"	65.28
[fol. 166]					
21	"	"	5/22/54	"	65.28
22	"	"	5/15/54	"	65.28
23	"	"	5/ 8/54	"	65.28
24	"	"	5/ 1/54	"	65.52
25	"	"	4/24/54	"	21.76
26	"	"	4/17/54	"	65.96

TOTAL $1,672.22

FOR 26 Weeks, Man's average is $ .....

(s) G. HUTCHINSON
JM

[fol. 166a]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

vs.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

STATEMENT OF POINTS RELIED ON BY THE APPELLANT ON APPEAL

1. The Court erred in not allowing the Defendant's Motion for a Directed Verdict presented at the time of trial.
2. The Court erred in denying the Defendant's Motion for Judgment Notwithstanding Verdict.
3. The Court erred in denying the Defendant's Motion for a new trial.

By its Attorney, Noel W. Deering, 532 South Station, Boston 10, Mass.

MINUTE ENTRY OF ARGUMENT—October 6, 1959
(omitted in printing)

[fol. 167]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

v.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

Appeal From the United States District Court for the District of Massachusetts.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Noel W. Deering, with whom *David W. Walsh* was on brief, for appellant.

James W. Kelleher, with whom *James R. DeGiacomo* was on brief, for appellee.

OPINION OF THE COURT—November 27, 1959

Woodbury, Chief Judge. On October 11, 1954, the plaintiff-appellee was employed by the defendant-appellant as a grill-car waitress on its regularly scheduled passenger train which left Boston at 7 A.M. bound for New York. As the train, proceeding at 12 to 15 miles per hour, entered the Providence, Rhode Island, railroad station about an hour later, the engineer made an emergency application of the brakes in an unsuccessful attempt to avoid running over a woman who stepped from the station platform onto the [fol. 168] tracks in front of the locomotive, obviously and concededly for the purpose of committing suicide.

At the time the brakes were applied the plaintiff was standing at the service counter at the forward end of the grill-car waiting for food from the kitchen. She was thrown

against the counter by the sudden stop of the train but she did not fall, although some of her fellow employees in the car lost their footing, and silverware, dishes and kitchen utensils in the car were thrown to the floor. The plaintiff immediately gave evidence of pain, principally in her shoulders and neck, and became hysterical. She was removed from the train at Providence and, with another girl car employee who was injured, sent back to Boston and there hospitalized. No serious physical injury has ever been found by the medical men who have examined her. There is no doubt, however, that since the event of October 11, 1954, she has suffered more or less acutely from paranoid psychosis, described by her medical expert at the trial as ". . . a mental disease characterized by suspiciousness, by the presence of ideas of guilt and reference to one's self of events not connected with one's self." To quote from the same source, her belief since 1954 or 1955 has been " . . . that she herself was personally responsible for the death of the woman who fell or jumped in front of the train on which she worked in 1954, just as though she were herself a murderer," and that " . . . there was going to be a murder trial at which she herself was to be the defendant." There is ample evidence, and indeed it appears to be conceded, that because of her mental condition the plaintiff has been unable to work or care for her family since the accident and that the prospects of her eventual recovery are not very bright.

In due course the plaintiff brought suit against the defendant in the court below under the Federal Employers' [fol. 169] Liability Act[1] and a trial by jury resulted in a verdict for the plaintiff on which the court immediately entered judgment. The defendant within the time limited by the rules moved for judgment notwithstanding the verdict and also for a new trial. Hearing was held on these motions at the conclusion of which the court announced:

"I am denying both motions. On the defendant's Motion for Directed Verdict I have endorsed this:

---

[1] 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U.S.C. § 51 *et seq.*

'This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was 'denied' but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free to do so. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959.'

"On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'"

The court then said in elaborating its views:

"In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence [fol. 170] of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not."

Furthermore, the court indicated that in its opinion the plaintiff had failed to establish causation. It said:

"With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954.

. . . . . .

"There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

The defendant below did not appeal from the denial of its motions for judgment notwithstanding the verdict and for a new trial. It did, however, seasonably appeal from the judgment entered on the verdict prior to the filing of its motions. Having moved at the appropriate time for a directed verdict, it can here challenge the sufficiency of the evidence to take the plaintiff's case to the jury. And, having moved within the time fixed in the Rules for judgment notwithstanding the verdict, it can properly ask this court for remand to the court below for the entry of judgment in its favor, not merely for a new trial. *Cone* v. *West* [fol. 171] *Virginia-Paper Co.*, 330 U.S. 212 (1947); *Johnson* v. *New York, N.H. & H.R. R. Co.*, 344 U.S. 48 (1952), and cases cited.

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506, 507 (1957), the Court said with reference to the Federal Employers' Liability Act: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." And then the Court said: "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The test is simply and easily stated. The trouble comes in applying it, for what may be entirely reasonable to one person may be utterly unreasonable to another. The Supreme Court of the United States, of course, has the final say in these cases as to what is or is not a reasonable conclusion to draw from the evidence. And we recognize that in recent years the Supreme Court has allowed juries great latitude in deciding what may or may not be a reasonable conclusion to draw from the evidence in cases under

the Federal Employers' Liability Act. We do not, however, read the Court's recent decisions as depriving trial judges in cases like this of their historic function of exercising a preliminary judgment on the facts to determine whether the plaintiff has shown enough to warrant a fair-minded jury in returning a verdict in his favor. *New York, New Haven & Hartford Railroad Co.* v. *Dox*, 249 F.2d 572, 573, 574 (C.A. 1, 1957). We think trial judges still have the duty, in these cases as in others, to screen the evidence to ascertain whether it is enough to persuade reasonable minds that some negligence of the employer contributed in some way or another to the plaintiff-employee's injury. [fol. 172] And we think the various courts of appeal still have a function to perform in reviewing the decisions of the district courts in their respective circuits on this matter. See the *Dox* case *supra*.

But of course, these functions, trial and appellate, are to be performed with an eye to the trend indicated by recent decisions of the Supreme Court. With this trend in mind, we turn to consideration of the evidence.

Trains from Boston to New York approach the Providence railroad station from the east on a gradual curve to the right. The platform for the accommodation of passengers, which is only a matter of inches above the top of the rails, was on the right of the train as it came into the station on track No. 3. The right hand rail of track No. 3 (we refer to right and left from the point of view of the engineer of the train, who was in his seat on the right hand side of the cab near the front of the diesel locomotive), is about two feet from the edge of the platform. The rails are 4 feet 8½ inches apart and about two feet to the left of the left hand rail there is a picket fence separating track No. 3 from the next track to the south, track No. 1.

The engineer testified that he first noticed the suicide as she stepped over the rail nearer the platform and that she was then 35 or 40 feet away. He said that at first he thought she had gone onto the track to pick up some object lying between the rails and did not realize that she either could not or did not intend to step back into safety until she had proceeded in the direction of the fence to the

vicinity of the further rail when she turned toward the locomotive and started to squat or kneel down and that thereupon he immediately made an emergency application of the brakes bringing the train to a stop in about 80 feet which was the shortest distance in which it could be stopped at 12 to 15 miles per hour on dry rails with brakes in proper [fol. 173] order, as they were at the time. The suicide's body was picked up under the wheels of the train about 68 feet back of the front of the locomotive.

Plaintiff's counsel does not suggest that if the engineer first saw the suicide when she was only 35 or 40 feet away he ought to have realized that he could not then stop the train in season to avoid running over her and so in the exercise of due care toward passengers and fellow employees on the train he should have made a gentler application of the brakes. Nor does he argue that an emergency application of the brakes was negligence in and of itself. See *Herdman* v. *Pennsylvania R. R. Co.*, 352 U.S. 518 (1957). His contention in a nut shell is that it could reasonably be found on the evidence in the record that in the exercise of due care the engineer should have seen the would-be suicide and sized up the situation sooner than he did and that had he done so, he could have brought the train to a stop without running over her.

Counsel for the plaintiff makes a rather involved argument in the attempt to show that on the evidence in the record the jury could reasonably infer that the woman was in the engineer's sight on the track an "obvious suicide" when the train was some 160 to 180 feet away so that, had the engineer acted as promptly as he should, he could have brought the train to a stop without running over the suicide and even without the necessity of an emergency application of the brakes. On analysis the argument impresses us as fallacious. We see no need to discuss it, however, for we think that the trend of recent decisions of the Supreme Court indicates that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone.

It is true that no eyewitness to the tragedy, and there were several, placed the front of the locomotive more than

40 feet away, about one half the distance in which the [fol. 174] train could possibly be stopped, when the suicide stepped off the platform onto the track. But the engineer said that he watched the suicide walk across the tracks toward the fence believing that she could and would get off the tracks and that he did not apply the brakes until she turned toward the locomotive and started to squat or kneel. From this it could well be inferred that the engineer did not apply the brakes as soon as he should. Indeed, from the testimony that the train could be stopped in 80 feet and the testimony that the suicide's body was picked up 68 feet back of the front of the locomotive, it would appear that although the engineer first saw the suicide when she was 40 feet away he did not apply the brakes until she was only 12 feet in front of the locomotive. It is true that the engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her. But recent decisions of the Supreme Court in cases under the Federal Employers' Liability Act, indeed, the applicable rule quoted above, seem to us clearly to indicate abandonment of the traditional rule that plaintiffs have the burden of persuasion in actions for negligence, at least insofar as actions for negligence under the Act are concerned, and that only the barest possibility of causation is enough to make out a case for the jury. Thus, although we can discern from the engineer's testimony only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, nevertheless, as we read recent decisions of the Supreme [fol. 175] Court, we feel that the plaintiff has shown enough to take her case to the jury.[2]

[2] See, for instance, *Harris* v. *Pennsylvania R. R. Co.*, decided October 13, 1959.

As to the causal connection between the plaintiff's mental condition and the running down of the suicide, it is enough to say that the plaintiff's medical expert so testified.

The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial.

Judgment will be entered affirming the judgment of the District Court.

[fol. 176]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—November 27, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: Roger A. Stinchfield, Clerk.

Thereafter, on December 15, 1959, mandate was stayed until further order of Court.

[fol. 177] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 178]

SUPREME COURT OF THE UNITED STATES

No. 709, October Term, 1959

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner,

vs.

MARY E. DONNELLY HENAGAN.

ORDER ALLOWING CERTIORARI—May 2, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
FILED

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. ~~709~~ 38

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Boston, Massachusetts,
February 11, 1960.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The New York, New Haven and Hartford Railroad Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on November 27, 1959.

Citations to Opinions Below.

The order of the judge of the District Court of Massachusetts (R. 133-134) is unreported and is set forth herein. The opinion of the Court of Appeals (R. 167) is re-

ported in 272 F. (2d) 153, and is printed in Appendix B attached hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 27, 1959 (R. 176). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented.

1. Whether a separate appeal must be taken from an order denying a motion for new trial seasonably filed after judgment, or whether the appeal from the judgment is sufficient to bring before the Court of Appeals the question of law raised by the denial of the motion.

2. Whether the Court of Appeals has correctly interpreted the decisions of this Court in cases arising under the Federal Employers' Liability Act (43 U.S.C. Sec. 51) as establishing (*a*) that the plaintiff no longer has the burden of persuasion in actions for negligence, (*b*) that only the barest possibility of causation is enough to make out a case for the jury, and (*c*) that only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner and running down the suicide was enough to take the case to the jury.

Statutes and Rules Involved.

The statutory provisions involved are 45 U.S.C. Sec. 51, and the Rules of Civil Procedure for the United States District Courts are Rules 50(b), 54(a), 58, 59(a), 59(b)

and 73(a). The pertinent provisions of these rules are printed in Appendix A attached hereto.

Statement.

The respondent on October 11, 1954, was employed by the petitioner as a grill-car attendant on a regularly scheduled passenger train *en route* from Boston to New York. As the train approached the station at Providence, Rhode Island, where there was a regularly scheduled stop, the engineer had decreased the speed of the train to between 13 and 15 miles an hour, intending to make the regular station stop (R. 24). After the front of the engine had reached the portion of the track adjacent to the station platform covered by a canopy the engineer saw a woman stepping across the rail nearest the station platform (R. 28). She was facing a fence on the opposite side when he first saw her (R. 32). She then took a step forward and turned and faced the engine and squatted down (R. 34). The engineer estimated the distance between her and the locomotive when he first saw her as between 35 and 40 feet (R. 36). He did not apply the brakes when he first saw her with her foot over the first rail, but as soon as he saw her take a step toward the fence and squat down he realized that she was not going to get off the track, and he immediately applied his brake in emergency in an effort to avoid running over her (R. 33). Several other witnesses, whose testimony was uncontradicted, estimated the distance as between 5 and 40 feet between the woman and the front of the locomotive when she was first seen by them on the track (R. 108; R. 110; R. 113; R. 116).

The emergency application of the brakes brought the train to a stop within a distance of about 80 feet (R. 37), whereas in making the intended station stop it would have

gone several hundred feet (R. 38). The body of the woman who had stepped onto the track in front of the locomotive was found 68 feet from the most forward part of the locomotive. There was testimony that the respondent was thrown against the counter but was not thrown off her feet by the sudden stop of the train (R. 59). She, however, became hysterical and was taken back to Boston on another train (R. 50). None of the physicians or specialists who examined her according to the records felt that she had a physical injury of any consequence. There was no evidence of brain damage (R. 103). The respondent had developed a reaction of guilt in causing the death of the woman, which was called a hysterical conversion reaction by the respondent's medical expert, who also testified that this reaction was based upon a paranoid psychosis that must have existed prior to this reaction (R. 104-105).

At the close of all the evidence the petitioner presented a motion for a directed verdict, which was denied conditionally by the Court (R. 133), and thereafter the jury returned a verdict in favor of respondent on January 7, 1959. Judgment was entered forthwith on the same date. Thereafter petitioner filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (R. 132). These motions were denied after hearing on the 13th day of January, 1959 (R. 133). At the hearing the trial judge made endorsements on the motions and stated the reasons for his denial of the several motions as follows (R. 133-134):

"I am denying both motions. On the Defendant's Motion for Directed Verdict I have endorsed this: 'This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was "denied" but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its ver-

dict this Judge would grant the motion were he free so to do. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959.'

"On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'

"I wish to be a little more explicit than I am in these endorsements. In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not.

"With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954. In my opinion every medical practitioner of any competence would say that the kind of condition which the plaintiff now has owes its origin to factors far antecedent to the 11th of October. It may be that what happened on the 11th of October acted as a trigger, but in my view not as a legal cause. It seems to me to be as irrelevant from the point of view of causation as if on that day the rain suddenly started to dash against the windows and

the plaintiff became frightened. There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

Petitioner filed notice of appeal from the judgment on February 11, 1959. The Court of Appeals in its opinion (272 F. (2d) 153, 156) noted that petitioner did not appeal from the denial of its motions for judgment notwithstanding the verdict and for a new trial. The Court thereupon treated the appeal from the judgment as raising only the question of sufficiency of the evidence raised by the petitioner's motion for a directed verdict. The Court, after holding that its interpretation of recent opinions of this Court required submitting the case to the jury, ended its opinion as follows:

"The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial." (R. 175.)

Reasons for Granting the Writ.

1. The refusal of the Court of Appeals to consider the question raised by the denial of defendant's motion for a new trial raises an important question of procedure in taking appeals on questions raised by action of a trial judge on motions for judgment notwithstanding verdict, and on motions for a new trial, seasonably filed as provided by Rule 59(b). The petitioner submits that the ruling of the Court of Appeals to the effect that in addition to an appeal

from the judgment an appeal must also be taken from the denial of the motion for new trial is in conflict with the rulings of this Court and the rulings of the Courts of Appeals in other circuits. It is also contrary to the apparent purpose and spirit of the Federal Rules of Civil Procedure (see Barron & Holtzoff, Federal Practice and Procedure, Rules Ed. § 1551). It is even in conflict with prior opinions in the First Circuit.

The motion for a new trial in the case at bar attacked the verdict on which the judgment was based. The trial judge denied it, not as an exercise of discretion, but on the express ground "that this Court construes the opinion and judgment of the Supreme Court of the United States as giving him no option but to deny the motion" (R. 133). This amounted to a ruling of law that the trial judge lacked the power to allow the motion in the exercise of his discretion. The issue, therefore, before the Court of Appeals was not one of abuse of discretion, but rather the power of the trial judge to exercise his discretion to set aside the verdict and grant a new trial.

The Court of Appeals, however, took the position that the question relating to the denial for a new trial was not before them, "for the defendant did not appeal from the denial of its motion for a new trial" (R. 175). The jury returned a verdict on January 7, 1959. Judgment was entered forthwith in accordance with Rule 58. The motion for new trial was filed January 12 and was denied January 13. The defendant thereafter seasonably appealed from the judgment. Was it also necessary for it to file a second appeal from the order on the motion to carry the question of law raised by the order to the Court of Appeals? The ruling of the Court of Appeals appears to indicate that a separate appeal from such an order is now required in the First Circuit.

This practice is contrary to that prescribed by the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). There the Court said (p. 253) that an appeal would lie, ". . . not from his order denying a new trial, for that order, save in most exceptional circumstances, is not appealable, but from the judgment entered on the verdict, for errors of law committed on the trial."

The practice now required in the First Circuit also appears to be in conflict with that in other circuits.

The exact situation as in the case at bar was involved in *DiGiovanni* v. *DiGiovannantonio*, 233 F. (2d) 26 (C.A. D.C. 1956). There the Court said (p. 28):

> "It is argued that Gabriel did not appeal from the denial of a new trial, since the notice of appeal ran literally only from the order of March 10, 1955 granting the letters of administration. We think the argument cannot be sustained. The motion was filed within 10 days of the entry of judgment; it was clearly a motion under Rule 59 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and was part of the same proceeding which produced the judgment from which Gabriel appeals. Until that motion was disposed of, the judgment lacked the finality requisite for appeal. Thus the order denying the motion for a new trial is a ruling that produced and is included within the final judgment and on appeal from that judgment properly brings the order before the reviewing Court."

The following cases show that the same practice as that in the District of Columbia is followed in other circuits:

Green v. *Reading Co.*, 180 F. (2d) 149, 150 (3 Cir. 1949):

Texas & New Orleans R.R. Co. v. *C. A. Underhill*, 234 F. (2d) 620, 623 (5 Cir. 1956).

Ford Motor Co. v. *Busam Motor Sales, Inc.*, 185 F. (2d) 531, 533 (6 Cir. 1950).

Bass v. *B. & O. Terminal R. Co.*, 142 F. (2d) 779, 780 (7 Cir. 1944).

Buder v. *Fiske*, 174 F. (2d) 260, 265 (8 Cir. 1949).

Agostino v. *Ellamar Packing Co., Inc.*, 191 F. (2d) 576, 577 (9 Cir. 1951).

Marshall's U.S. Auto Supply Co. v. *Cashman*, 111 F. (2d) 140, 141 (10 Cir. 1940).

Until the decision in the instant case the First Circuit, while permitting appeals from orders on motions for new trials in certain unusual circumstances (*Aberlin* v. *Zisman*, 244 F. (2d) 620 (1 Cir. 1957)), had recognized that the proper method of appealing from such orders was by an appeal from the judgment.

Sears v. *Pauly*, 261 F. (2d) 304, 307 (1 Cir. 1958).

It appears that, in order to permit appeals in cases where the appellant had lost the right to appeal from the judgment (*Aberlin* v. *Zisman, supra*) or had mistaken its remedy (*United States* v. *Best*, 212 F. 2d 743, 744, footnote (1 Cir. 1954); *Creedon* v. *Loring*, 249 F. (2d) 714, 717 (1 Cir. 1957)), the Court had permitted appeals from the post-judgment orders as the "final decision" in the case. The following significant language appears in the footnote to the *Best* case: "Strictly, we think, the appeal should have been taken from the original judgment of June 10, 1953, not from the order denying the motion for rehearing."

The case of *Peterman* v. *Indian Motorcycle Co.*, 216 F. (2d) 289 (1 Cir. 1954), may point the way to the result in

the instant case, but it is significant that the Court in *Sears* v. *Pauly, supra*, referred to that case as giving a choice between appealing from the judgment itself and the order denying the motion, and held that an appeal from the judgment in the *Pauly* case was properly taken.

It now seems clear that what started as an exception to the general rule in permitting appeals in hardship cases from the post-judgment motions has now become the rule in the First Circuit. Those appeals, at first permissive, have now become mandatory. The practice of appealing from the judgment is no longer a simple method of protecting a litigant's rights, but has become a trap for the unwary.

The petitioner submits that, because the ruling of the Circuit Court involves an important question of Federal Court practice and is in conflict with the practice as established by this Court, and by the Rules of Civil Procedure, and is also in conflict with the law as applied in the other circuits, the writ applied for should be granted.

2. The Court of Appeals in deciding the case has misconstrued and misapplied applicable opinions of this Court setting forth the governing principles defining the proof which requires a submission to the jury of cases under the Federal Employers' Liability Act.

Specifically, the Court below premised its decision upon a reading of Supreme Court decisions to the effect that the traditional rule that plaintiffs have the burden of persuasion in actions for negligence under the Act has been abandoned; that only the barest possibility of causation is enough to make out a case for the jury; and that only the faintest scintilla of evidence to suggest the inference of any causal connection between the negligence and the injury is sufficient (Appendix B, p. 28).

The petitioner submits that, despite occasional references in dissenting opinions of this Court to the contrary, the Court has never held that the proper test to be applied as to the sufficiency of evidence to warrant submitting a case to the jury, *i.e.*, "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (*Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500, 506, 507), was in effect the equivalent of a standard under which the plaintiff may recover if he adduced only the faintest scintilla of evidence on the issue of causation. See in this respect *Brady* v. *Southern R. Co.*, 320 U.S. 476, where the Court said at page 479: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." In the more recent decision of *Inman* v. *B. & O. R.R. Co.*, 4 L. ed. (2d) 198, the Court, in applying the test of *Rogers* v. *Mo. Pac. R. Co.*, *supra*, to the facts of the case before it, demonstrated that the correct norm for decision did not, as the Court of Appeals claims, permit an abandonment of the rule that plaintiffs have the burden of persuasion in actions for negligence under the Act. Thus, at page 201 of its decision, the Court said: "The burden of proving that the crossing was an unsafe place to work was on petitioner." In addition the Court also uses language in the decision which militates against its acceptance as a proper rule of decision the rule that the faintest scintilla of evidence of negligence or causation is enough to take the case to the jury. Illustrative of this point are the following excerpts from the decision:

> "In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the

part of the railroad could have played no part in petitioner's injury.

. . . . . .

"In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

See also *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576, where the Court says:

"The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged."

Thus the petitioner submits that the Court of Appeals erroneously construed the decisions of this Court in holding that the tests enunciated by it in determining the sufficiency of the evidence were tantamount to a requirement only that the barest possibility of causation be present to make out a case for the jury, and that the plaintiff is relieved of its traditional burden of proof in suits for negligence under the Federal Employers' Liability Act.

It cannot be argued that the various expressions of the Court of Appeals in its opinion, such as "barest possibility of causation," "faintest scintilla of evidence," etc., are just dicta in terms of attempted paraphrases of the proper test and that as such they did not enter into the decision, since in its opinion the Court expressly states

(Appendix B, p. 28) that it "can discern from the engineer's testimony [the testimony upon which it relies exclusively to supply evidence of negligence and causation] only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, . . ."

The petitioner submits that the errors committed by the Court of Appeals are on matters of basic importance to the proper administration of the Act and could have far-reaching effects on parties litigant in Federal Employers' Liability Act cases. Many of the considerations which have persuaded this Court to grant certiorari in Federal Employers' Liability Act cases where the petitioner is the plaintiff-employee are also present in cases where the defendant-carrier is the party seeking certiorari. The zealousness of the Court to effectuate the intention of the Congress to secure the right to a jury determination where the right has been improperly denied should be matched with an equal concern on its part to safeguard all of the historical incidents of a jury trial, including the duty of the trial judge of determining whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming the jury took a view of the evidence most favorable to the plaintiff (see *Wilkerson* v. *McCarthy*, 336 U.S. 53; concurring opinion of Mr. Justice Frankfurter, 64-65), and the right of a trial judge in the exercise of his discretion to set aside a verdict and grant a new trial if it appears that a verdict, if allowed to stand, would result in a miscarriage of justice.

In those circuits which unduly relax the requirements fixed by the Court, the result could also be detrimental to plaintiff-employees. Thus cases prepared with an eye to overly liberalized norms may eventually be overturned by a higher court, where presentation actually could have

been made according to the proper test if that test had not been confused by lower federal courts.

Assuming that the Court of Appeals did make use of the proper test in determining the sufficiency of the evidence to take the case to the jury, the petitioner submits that nevertheless it improperly applied that test to the facts of the case before it.

The only scintilla of evidence of negligence suggested by the Court below is the failure of the engineer to attempt to bring his train to an emergency stop immediately upon seeing the suicide on the track 40 feet away rather than waiting until he was within about 12 feet from her. It is difficult to see any causal relation between this and the negligence relied on by the respondent in her complaint, *i.e.*, "negligently causing the train to come to a sudden and unexpected stop" (R. 3-4). These are two bases of negligence arising out of two conflicting duties. The Court below holds that the duty owed the suicide required the engineer to make an emergency stop in an attempt to avoid running over her, and felt that the engineer could be found negligent for not acting more promptly even though she first appeared on the track when the front of the locomotive was only 40 feet away from her and the locomotive could not have been stopped in emergency in less than 80 feet.

The duty which the respondent claims was violated was negligently causing the train to come to a sudden and unexpected stop.

The stopping of the train was sudden and unexpected, but that was not negligence toward the respondent in the circumstances of this case. *Herdman* v. *Penn. R. Co.*, 352 U.S. 518 (1957).

Whether the engineer had applied his brakes 40 feet from the suicide or 12 feet from her, the result of the stopping would have been the same both as to the suicide and

as to the respondent. It is the fact that the train stopped suddenly and unexpectedly that is the basis of the respondent's action, and the distance the engine was from the suicide when the brakes were applied has no causal relation to the respondent's injuries.

On the facts accepted by the Court of Appeals as the established facts of the case the conclusion cannot be reasonably drawn that negligence on the part of the railroad played any part, even so slight, in the injury of the plaintiff below. From a reading of the opinion it is clear that the Court recognizes as established the fact that, "when the suicide stepped off the platform onto the track," "the front of the locomotive was not more than 40 feet away." The Court also appears to accept as established that an emergency application of the brakes could not bring the train to a stop in less than 80 feet.* Yet on this state of the record the Court comes to the incredible conclusion that the jury might have found that an application of the brakes when the engineer first saw the suicide on the tracks, *i.e.*, 40 feet from the Diesel, somehow might have brought the train to a stop soon enough to avoid hitting the woman. It is inescapable that the Court arrives at this conclusion, albeit by a somewhat circuitous route. Thus from its consideration of the evidence the Court states that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone. To support this statement, the Court finds evidence of negligence in that it could be inferred from the engineer's testimony that he did not apply the brakes as soon as he should have. The Court admits that "The engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by

*The Court of Appeals does not treat as negligence in and of itself the emergency application of the brakes.

a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her" (R. 174). To supply that lack, however, the Court states that it can discern from the engineer's testimony a scintilla of evidence, even though it be the faintest, to suggest the inference of a causal connection between the engineer's failure to apply the brakes sooner than he did and running down the suicide. When it comes to actually demonstrating what that scintilla is, the Court never does set forth a possible factual hypothesis on which the engineer could have avoided running over the woman, but takes refuge in "recent decisions of the Supreme Court." Thus it appears that, if there is a scintilla of evidence in this case, it is a scintilla supplied by the so-called recent trend of Supreme Court decisions, not by the facts of the case.

It might be argued that implicit in the Court's decision on the facts is a rejection of the engineer's testimony as to the distance which it would take the train to stop upon an emergency application of the brakes. Thus if the train could be stopped in an emergency in 20 feet, 30 feet, or in any distance short of 40 feet, then, in the light of the other undisputed evidence, it would indeed be proper to say that there was a causal connection between the failure to apply the brakes sooner and the running over of the suicide. The only difficulty is that there is no evidence in the record on the distance required for an emergency stop other than that supplied by the engineer's testimony. So, if that testimony is rejected, then there is a complete lack of evidence on this point and for the jury to make a finding it would have to indulge in conjecture. As the Court stated in *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 576, ". . . disbelief of the engineer's testimony would not supply a want of proof." Thus, the only credible evidence is that the train

could not be stopped in less than 80 feet. Indeed, the following language in the Court of Appeals decision seems to demonstrate that the Court is committed without qualification to acceptance of that fact. "It is true that no eye witness to the tragedy, and there were several, placed the front of the locomotive more than 40 feet away, about half the distance in which the *train could possibly be stopped*, when the suicide stepped off the platform onto the track" (R. 173-174). (Emphasis supplied.) On the state of the facts accepted by the Court of Appeals we might ask ourselves in the words of Justice Whittaker in his concurring opinion in *Inman* v. *B. & O. R.R. Co.*, cited, *supra*, "how could [the petitioner] have prevented the casualty"?

The petitioner submits that on the facts of this case there was not any substantial evidence, or even a scintilla of evidence, of negligence on the part of the petitioner that caused or directly contributed in any degree to cause the injury of the plaintiff below. Consequently the Court of Appeals clearly erred in deciding the case.

Conclusion.

For the foregoing reasons this petition for a writ of certeriorari should be granted.

Respectfully submitted,
NOEL W. DEERING,
Counsel for Petitioner.

ARTHUR D. HEALEY,
DAVID W. WALSH,
Of Counsel.

Boston, Massachusetts,
February 11, 1960.

Appendix A.

United States Code (1952 Edition).

45 U.S.C. Sec. 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Rules of Civil Procedure.

Rule 50. Motion for a Directed Verdict:

(b) Reservation of decision on motion. Whenever a motion for a directed verdict made at the close of all the

evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 54. Judgments; Costs:

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58. Entry of Judgment:

Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; . . . The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 59. New Trials; Amendment of Judgments:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Rule 73. Appeal to a Court of Appeals:

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are speci-

fied in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

Appendix B.

OPINION OF COURT OF APPEALS FOR THE FIRST CIRCUIT IN NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEFENDANT, APPELLANT, v. MARY L. DONNELLY HENAGAN, PLAINTIFF, APPELLEE.

(Heard October 6, 1959; Decided November 27, 1959.)

Before Woodbury, Ch. J., and Hartigan and Aldrich, Cir. JJ.

WOODBURY, Chief Judge.

On October 11, 1954, the plaintiff-appellee was employed by the defendant-appellant as a grill-car waitress on its regularly scheduled passenger train which left Boston at 7 A.M. bound for New York. As the train, proceeding at 12 to 15 miles per hour, entered the Providence, Rhode Island, railroad station about an hour later, the engineer made an emergency application of the brakes in an unsuccessful attempt to avoid running over a woman who stepped from the station platform onto the tracks in front of the locomotive, obviously and concededly for the purpose of committing suicide.

At the time the brakes were applied the plaintiff was standing at the service counter at the forward end of the grill-car waiting for food from the kitchen. She was thrown against the counter by the sudden stop of the train

but she did not fall, although some of her fellow employees in the car lost their footing, and silverware, dishes and kitchen utensils in the car were thrown to the floor. The plaintiff immediately gave evidence of pain, principally in her shoulders and neck, and became hysterical. She was removed from the train at Providence and, with another grill-car employee who was injured, sent back to Boston and there hospitalized. No serious physical injury has ever been found by the medical men who have examined her. There is no doubt, however, that since the event of October 11, 1954, she has suffered more or less acutely from paranoid psychosis, described by her medical expert at the trial as "• • • a mental disease characterized by suspiciousness, by the presence of ideas of guilt and reference to one's self of events not connected with one's self." To quote from the same source, her belief since 1954 or 1955 has been "• • • that she herself was personally responsible for the death of the woman who fell or jumped in front of the train on which she worked in 1954, just as though she were herself a murderer," and that "• • • there was going to be a murder trial at which she herself was to be the defendant." There is ample evidence, and indeed it appears to be conceded, that because of her mental condition the plaintiff has been unable to work or care for her family since the accident and that the prospects of her eventual recovery are not very bright.

In due course the plaintiff brought suit against the defendant in the court below under the Federal Employers' Liability Act,[1] and a trial by jury resulted in a verdict for the plaintiff on which the court immediately entered judgment. The defendant within the time limited by the rules moved for judgment notwithstanding the verdict and also

1. 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1401, 45 U.S.C. § 51 et seq.

for a new trial. Hearing was held on these motions at the conclusion of which the court announced:

> "I am denying both motions. On the defendant's Motion for Directed Verdict I have endorsed this: 'This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was "denied" but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free to do so. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959.'
>
> "On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'"

The court then said in elaborating its views:

> "In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not."

Furthermore, the court indicated that in its opinion the plaintiff had failed to establish causation. It said:

> "With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954.
>
> • • • • • •
>
> "There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

The defendant below did not appeal from the denial of its motions for judgment notwithstanding the verdict and for a new trial. It did, however, seasonably appeal from the judgment entered on the verdict prior to the filing of its motions. Having moved at the appropriate time for a directed verdict, it can here challenge the sufficiency of the evidence to take the plaintiff's case to the jury. And, having moved within the time fixed in the Rules for judgment notwithstanding the verdict, it can properly ask this court for remand to the court below for the entry of judgment in its favor, not merely for a new trial. Cone v. West Virginia Paper Co., 1947, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849; Johnson v. New York, N. H. & H. R. Co., 1952, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77, and cases cited.

In Rogers v. Missouri Pacific R. Co., 1957, 352 U.S. 500, 506, 507, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 the Court said

with reference to the Federal Employers' Liability Act: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." And then the Court said: "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The test is simply and easily stated. The trouble comes in applying it, for what may be entirely reasonable to one person may be utterly unreasonable to another. The Supreme Court of the United States, of course, has the final say in these cases as to what is or is not a reasonable conclusion to draw from the evidence. And we recognize that in recent years the Supreme Court has allowed juries great latitude in deciding what may or may not be a reasonable conclusion to draw from the evidence in cases under the Federal Employers' Liability Act. We do not, however, read the Court's recent decisions as depriving trial judges in cases like this of their historic function of exercising a preliminary judgment on the facts to determine whether the plaintiff has shown enough to warrant a fair-minded jury in returning a verdict in his favor. New York, New Haven & Hartford Railroad Co. v. Dox, 1 Cir., 1957, 249 F.2d 572, 573, 574. We think trial judges still have the duty, in these cases as in others, to screen the evidence to ascertain whether it is enough to persuade reasonable minds that some negligence of the employer contributed in some way or another to the plaintiff-employee's injury. And we think the various courts of appeal still have a function to perform in reviewing the decisions of the dis-

trict courts in their respective circuits on this matter. See the Dox case supra.

But of course, these functions, trial and appellate, are to be performed with an eye to the trend indicated by recent decisions of the Supreme Court. With this trend in mind, we turn to consideration of the evidence.

Trains from Boston to New York approach the Providence railroad station from the east on a gradual curve to the right. The platform for the accommodation of passengers, which is only a matter of inches above the top of the rails, was on the right of the train as it came into the station on track No. 3. The right hand rail of track No. 3 (we refer to right and left from the point of view of the engineer of the train, who was in his seat on the right hand side of the cab near the front of the diesel locomotive), is about two feet from the edge of the platform. The rails are 4 feet 8½ inches apart and about two feet to the left of the left hand rail there is a picket fence separating track No. 3 from the next track to the south, track No. 1.

The engineer testified that he first noticed the suicide as she stepped over the rail nearer the platform and that she was then 35 or 40 feet away. He said that at first he thought she had gone onto the track to pick up some object lying between the rails and did not realize that she either could not or did not intend to step back into safety until she had proceeded in the direction of the fence to the vicinity of the further rail when she turned toward the locomotive and started to squat or kneel down and that thereupon he immediately made an emergency application of the brakes bringing the train to a stop in about 280 feet which was the shortest distance in which it could be stopped at 12 to 15 miles per hour on dry rails with brakes in proper order, as they were at the time. The suicide's body was picked up under the wheels of the train about 68 feet back of the front of the locomotive.

Plaintiff's counsel does not suggest that if the engineer first saw the suicide when she was only 35 or 40 feet away he ought to have realized that he could not then stop the train in season to avoid running over her and so in the exercise of due care toward passengers and fellow employees on the train he should have made a gentler application of the brakes. Nor does he argue that an emergency application of the brakes was negligence in and of itself. See Herdman v. Pennsylvania R. R. Co., 1957, 352 U.S. 518, 77 S.Ct. 455, 1 L.Ed.2d 508. His contention in a nut shell is that it could reasonably be found on the evidence in the record that in the exercise of due care the engineer should have seen the would-be suicide and sized up the situation sooner than he did and that had he done so, he could have brought the train to a stop without running over her.

Counsel for the plaintiff makes a rather involved argument in the attempt to show that on the evidence in the record the jury could reasonably infer that the woman was in the engineer's sight on the track an "obvious suicide" when the train was some 160 to 180 feet away so that, had the engineer acted as promptly as he should, he could have brought the train to a stop without running over the suicide and even without the necessity of an emergency application of the brakes. On analysis the argument impresses us as fallacious. We see no need to discuss it, however, for we think that the trend of recent decisions of the Supreme Court indicates that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone.

It is true that no eyewitness to the tragedy, and there were several, placed the front of the locomotive more than 40 feet away, about one half the distance in which the train could possibly be stopped, when the suicide stepped off the platform onto the track. But the engineer said that he watched the suicide walk across the tracks toward the fence

believing that she could and would get off the tracks and that he did not apply the brakes until she turned toward the locomotive and started to squat or kneel. From this it could well be inferred that the engineer did not apply the brakes as soon as he should. Indeed, from the testimony that the train could be stopped in 80 feet and the testimony that the suicide's body was picked up 68 feet back of the front of the locomotive, it would appear that although the engineer first saw the suicide when she was 40 feet away he did not apply the brakes until she was only 12 feet in front of the locomotive. It is true that the engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her. But recent decisions of the Supreme Court in cases under the Federal Employer's Liability Act, indeed, the applicable rule quoted above, seem to us clearly to indicate abandonment of the traditional rule that plaintiffs have the burden of persuasion in actions for negligence, at least insofar as actions for negligence under the Act are concerned, and that only the barest possibility of causation is enough to make out a case for the jury. Thus, although we can discern from the engineer's testimony only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, nevertheless, as we read recent decisions of the Supreme Court, we feel that the plaintiff has shown enough to take her case to the jury.[2]

2. See, for instance, Harris v. Pennsylvania R. Co., 80 S.Ct. 22.

As to the causal connection between the plaintiff's mental condition and the running down of the suicide, it is enough to say that the plaintiff's medical expert so testified.

The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial.

Judgment will be entered affirming the judgment of the District Court.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

vs.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

STATEMENT OF POINTS RELIED ON BY THE APPELLANT ON APPEAL.

1. The Court erred in not allowing the Defendant's Motion for a Directed Verdict presented at the time of trial.

2. The Court erred in denying the Defendant's Motion for Judgment Notwithstanding Verdict.

3. The Court erred in denying the Defendant's Motion for a new trial.

By its Attorney,

/s/ NOEL W. DEERING

532 South Station
Boston 10, Mass.

CLERK'S CERTIFICATE

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals for the First Circuit, certify that the foregoing page contains and is a true copy of the statement of points relied on by the appellant on appeal "furnished" to the Clerk of this Court under Rule 24(2) of the Rules of said Court, on July 10, 1959, in the cause in said Court numbered and entitled 5511, The New York, New Haven and Hartford Railroad Company, defendant, appellant, versus Mary L. Donnelly Henagan, plaintiff, appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit at Boston, Massachusetts, in said First Circuit, this eleventh day of February, A. D. 1960.

ROGER A. STINCHFIELD
Clerk.

[Seal]

FILE COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 38

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1959

No. 709.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

1. Does the petition make any substantial showing that the evidence was insufficient?

2. Does the petition make any substantial showing that the Motion for New Trial was erroneously disposed of?

Statement

Petitioner's statement omits the relevant matter summarized below.

The engineer Crafts testified that he did not see the deceased woman (Mrs. Montell) step off the platform be-

is apparent that the jury in this case disregarded the law as given by your Honor.

The Court: I cannot say that. I can only say that if this were a case in which a verdict was permissible for the plaintiff, then I don't think they disregarded my instructions. I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but I am not going to help you much here.

Mr. Deering: Well, then perhaps in view of that there is no need for me to continue further.

* * *

Argument

I. There Is No Substantial Question as to the Sufficiency of the Evidence.

This case is a strange compound of tragedy and geometry. One woman, Montell, is killed on the track. The other, Henagan, is physically injured by the violent stopping of the train, and caused, in the sequel, to believe that she is responsible for Montell's death. Here is a poor engineer, says the railroad, caught between these unbalanced females. What was he to do, it asks, when a madwoman threw herself in front of his train when he was but 40 feet away?

Nothing of the sort happened. Mrs. Montell did not plunge in front of the train—she *walked*. She *walked* on the track for 11 seconds at least before she was hit, and during 9 of those seconds she could have been seen by the engineer.

The basic geometry we shall discuss is established by Ex. 1A (DRA 107), a scale-plan of the track and platform. We have reproduced the relevant part of that exhibit in

Appendix A of this brief taking care to preserve its scale. With that before us, we ask, as the jury did: *How far was Montell from the engineer when she stepped off the platform?* The railroad says the situation was thus:

FIG. 1

This ignores vital evidence: *the engineer himself testified that he did not see M step off the platform because his view was blocked by a baggage-truck and an ice-truck on the platform.* (DRA 14, 17-18, 28-29). The true geometry is not that of Figure 1. It is the following:

FIG. 2

Here B represents the baggage- and ice-trucks, and the dotted-line is the interrupted line of vision of E. An elementary law of optics, perceived and applied by the jury, tells us that MBE is a straight line. An equally elementary law of geometry shows that the distance ME must exceed the distance MB.

A small experiment performed on Appendix A (or Ex. 1A) will demonstrate that the distance ME must far exceed 40 feet. 40 feet on Ex. 1A is two inches. Take a foot-rule and place the zero end of it *anywhere* on the line marking the edge of the platform (M's position). Place the two-inch mark on the right-hand rail (E's position). Clearly there will be no obstacle on the platform between 0 and 2. There will indeed be no platform between 0 and 2!

The jury had evidence before it from which it could locate M and B on Ex. 1A. First, as to M: the witness Brewster testified that he arrived on the platform via the stairway in the east kiosk shown on Ex. 1A; that he proceeded east to the fifth post and waited for the train; that Mrs. Montell engaged him in conversation and then moved to his left "about 20 feet or so". (DRA 107-109; Brewster marked the fifth post on Ex. 1A, DRA 109). We submit that the jury could find that M left the platform between the fifth and sixth posts at the point we have indicated on Appendix A of this brief.

The engineer himself testified that the baggage- and ice-trucks which blocked his view were at ". . . the east end of the station . . . before you get to that canopy . . ." (DRA 30). Examining Ex. 2A, a photograph which looks east (DRA 10), he said the trucks were "just the other side of this crossing here" (DRA 42). We submit that the jury could find that they were anywhere between the east crossing shown on Ex. 1A and the east end of the canopy. We have, on Appendix A, located them at the spot most favorable to the railroad: just to the east of the crossing at the edge of the platform.

Having located M and B on Ex. 1A the jury could draw a straight line through them and prolong it till it intersected the right hand-rail (Appendix A). It could find that E was at this intersection when M stepped off the platform. It could measure ME and find it to be 11 inches or 220 feet. *The jury could properly conclude that when M stepped off the platform, E was 220 feet, or 11 seconds away,* his speed being 13-15 miles per hour (DRA 12):

FIG. 3

So far E has not seen M. *When could he first have seen her?* Obviously when he drew abreast of the obstacle on the platform:

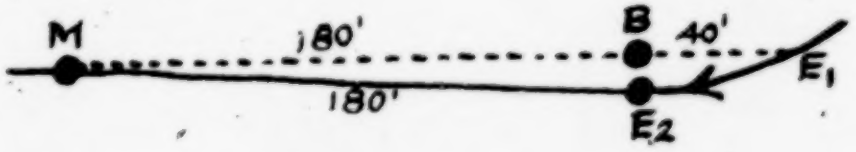

FIG. 4

(Approximately 2 seconds elapse between Figure 3 and Figure 4.) *The jury could properly find that when E got to the east crossing* (Ex. 1A; Appendix A) *he had a clear view of M on the track, and that M was then 180 feet or 9 seconds away.*

Clearly M was on the track for some 11 seconds before she was struck. No one says she plunged or jumped in front of the train. On the contrary: "she stepped out slowly" (Bowen, DRA 113), "she walked toward the farther rail" (Meegan, DRA 117; Dupere, DRA 110). One witness says she went to the fence (Nelson, DRA 115), before she turned back and kneeled, or squatted, or fell in front of the engine. For 9 seconds E saw or should have seen these movements, which indicate an obvious suicide, or perhaps merely a bewildered woman approaching a fence in which, *to E's knowledge*, there was no opening (Crafts, DRA 34).

E took no action whatsoever until 8 of the 9 seconds elapsed. He then woke and brought the train to a sudden and violent stop. This would clearly take the case to the jury even in an action by a passenger at Common Law.

Dorr v. *Lehigh Valley R.R. Co.*, 211 N.Y. 369, 373-374. The present case involves liability, not to a seated passenger, but to an employee whose duty as a waitress required her to stand. She was thus, to the knowledge of the rail-

road, peculiarly vulnerable in case of a sudden stop. Furthermore, had there been a partial application of the brakes preceding the final stop, she would have been warned of the danger, as the jury could find from testimony of her fellow-employee, Driscoll.

> "Q. Have you become aware as a general matter when a train stops in your experience—do you become aware of that stopping in some way? A. Well, only through vibration, feeling the air going on the train for brakes; you feel a sudden vibration which you are quite used to, even approaching every stop you feel a certain vibration. You're acclimated to that.
>
> * * *
>
> "Q. Generally, when brakes are applied when the train comes to a stop, are you made aware of it through some kind of vibration? A. Yes.
>
> "Q. Which occurs before the train finally comes to a stop? A. Yes." (Driscoll, DRA 56.)

Here there was no warning whatsoever:

> "Q. Now did anything of that kind happen in this particular case on October 11, 1954? A. No. No, it was a sudden stop.
>
> * * *
>
> "The Court: Just a moment. You are being asked there was no vibration before this train came to a stop. "The Witness: No. None that I remember of, your Honor. Just a sudden stop. Period." (Driscoll, DRA 56-57.)

The verdict in this case was based upon geometry and mensuration not upon passion or sympathy. It is respectfully submitted that there is no substantial question as

to the sufficiency of the evidence. Petitioner's question No. 2 (Pet. p. 2) asks this Court to parse and construe an opinion of the Court of Appeals which is based on a false and partial view of the evidence. The writ ought not to issue for grammatical reasons. In the circumstances its issuance would be a great injustice to the respondent Henagan.

II. No Substantial Question Is Raised by the Disposition of the Railroad's Motion for New Trial.

Petitioner argues (Pet. p. 7) that the trial court denied the motion for new trial as a matter of law and not in the exercise of its discretion. If the record consisted solely of the written notation made by the trial judge on the motion (DRA p. 133), the conclusion perhaps would follow. But the judge himself plainly indicated that he wished "... to be a little more explicit than I am in these endorsements." (DRA 133.) We submit that the entire transcript of January 13, 1959, must be considered in order to determine what the trial judge did.

At the start of the hearing of January 13, 1959, defendant's counsel cited and discussed *Herdman* v. *Pennsylvania R.R. Co.*, 352 U.S. 518 (PRA 33.) That case, he urged, decided that it could not be negligence "for an engineer of a train to make a sudden stop when met with an emergency." (PRA 34.) To this the Court remarked:

> "You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier." (PRA 34.)

In making this remark, we submit that the trial judge passed upon and denied grounds 1 and 2 assigned in the motion for new trial. Those grounds are as follows:

"1. That the verdict is contrary to the evidence and against the weight of the evidence;

"2. That the verdict is against the law applicable to the evidence . . ." (DRA 132.)

That conclusion, we submit, is re-inforced by the next succeeding remark of the court made after an interjection by Mr. Deering:

"The Court: You persuaded the thirteenth juror, but not the twelve." (PRA 35.)

Then follows on page 36 of the Transcript of January 13, 1959 (PRA 35) the following:

"Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.

"The Court: This is a perfect case which I would be very happy to see how nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.

"Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that *it is all the stronger case for a Motion for a New Trial because I think it is apparent that the jury in this case disregarded the law* as given by your Honor.

"The Court: *I cannot say that.* I can only say that if this were a case in which a verdict was permissible for the plaintiff, then *I don't think they disregarded my instructions.* I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, *but I am not going to help you much here.* (italics supplied.)

Here, we submit, the judge again ruled that he did not regard the verdict as being against the law as given by him to the jury in his instructions, and again denied the first and second grounds assigned in the motion for new trial. He further indicated definitely that he would not grant that motion. At that point, we respectfully submit, Mr. Deering acquiesced, and ceased to press the motion for new trial on any ground, for he then said to the court:

> "Well, then, perhaps in view of that there is no need for me to continue further." (PRA 35.)

All this occurred before the trial judge read the endorsement on the motion. (DR. 133.) That endorsement, therefore, in no way relates to the motion for new trial but only to the motion for judgment notwithstanding the verdict.

If we are wrong in what we have just said and if the trial court did deny the motion as a matter of law this clearly was an error of law arising after judgment and not involved in any way in the judgment of January 8, 1959. It has long been established by decisions of this court that an order entered after judgment, denying a motion for a new trial as a matter of law, is an order which is itself appealable. In *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482-483, 53 S.Ct. 252, 255, 77 L.Ed. 439, this court, speaking through Mr. Justice Brandeis, held as follows:

> "Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox* v. *United States*, 146

U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917; *Ogden* v. *United States*, 3 Cir., 112 F. 523; *or if it acted on the mistaken view that there was no jurisdiction to grant it*, or that there was no authority to grant it on the ground advanced, *Felton* v. *Spiro*, 6 Cir., 78 F. 576, 581; *Dwyer* v. *United States*, 9 Cir., 170 F. 160, 165; *Paine* v. *St. Paul Union Stockyards Co.*, 8 Cir., 35 F.2d 624, 626-628." (italics supplied.)

If, as petitioner argues, the order of January 13, 1959, denied the motion for a new trial as a *matter of law* it follows that the order was in itself appealable and that it was a "judgment" within the definition of Rule 54(a) of the Federal Rules of Civil Procedure (Pet., App. A, p. 19). There were thus, if petitioner is correct in this part of his argument, two "judgments" in this case, one entered on January 8, 1959, and the other entered on January 13, 1959. Only the second "judgment" is affected by the alleged error of law of which petitioner now complains. He has appealed only from the first "judgment" (DRA 135). It is submitted that petitioner's question No. 1 (Pet. p. 2) presents no substantial question for the consideration of this court.

Conclusion

For the reasons above set forth it is respectfully submitted that the petition for certiorari presents no substantial question for the consideration of the Court despite the suggestion of the trial court (PRA 35) that this is a "perfect case" for its consideration. We suggest that the result arrived at by the jury is so plainly correct that it would be a gross injustice to respondent to prolong this litigation any further.

Respectfully submitted.

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15

Eastern stairway.

Location of witness Brewster at 5th post east of stairway. (Brewster DRA 107 -108).

KIOSK

POST

Location of Mrs. Montell as she left platform, per witness Brewster. (DRA 107 - 109).

vster
vay.
).

Position of baggage and ice-trucks per testimony of engineer Crafts (DRA 38, 39). These obscured his view of Mrs. Montell as she stepped from platform. (Crafts, DRA 17, 28 - 29.)

T. SHELTER

GATE

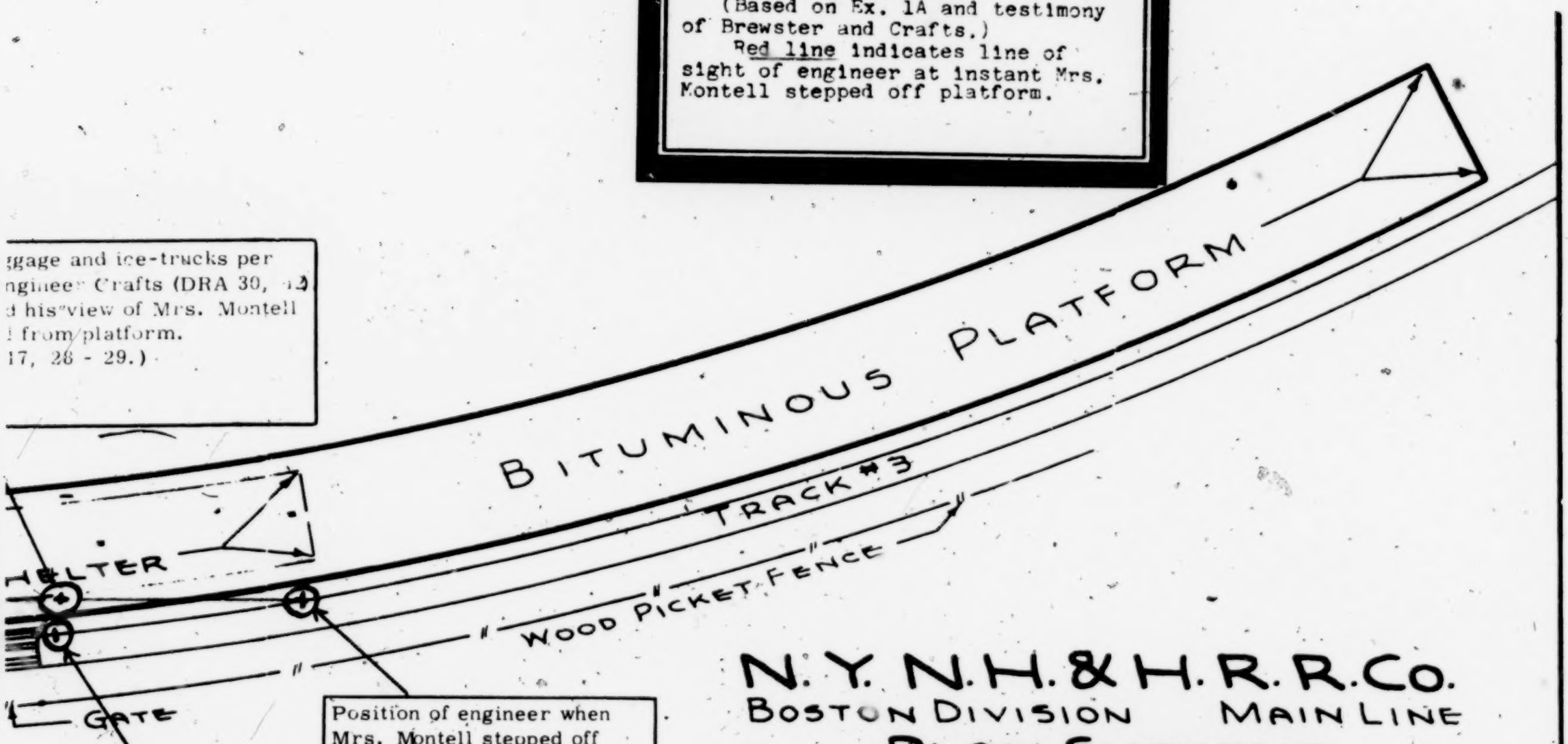
rs. Montell as
rm, per witness
RA 107 - 109).

When engineer reached this point he had clear view of Mrs Montell on the track 130 feet away.

Position of e
Mrs. Montel
platform.

APPENDIX A
(Based on Ex. 1A and testimony of Brewster and Crafts.)
Red line indicates line of sight of engineer at instant Mrs. Montell stepped off platform.

ggage and ice-trucks per
ngineer Crafts (DRA 30, 31)
d his view of Mrs. Montell
l from platform.
17, 28 - 29.)



engineer reached this
e had clear view of Mrs
l on the track 180 feet

Position of engineer when Mrs. Montell stepped off platform.

N.Y. N.H. & H.R.R.Co.
BOSTON DIVISION MAIN LINE
PLAN SHOWING
PORTION OF TRACK #3 & PLATFORM
UNION STATION
PROVIDENCE, RHODE ISLAND
SCALE 1" = 20'

SURVEYED BY AEF BMS PHTO

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 38.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
v.
MARY [redacted] DONNELLY HENAGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Court of Appeals is reported at 272 F. 2d 153.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 27, 1959. The petition was filed February 15, 1960, and was granted May 2, 1960 (R. 175). The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254 (1).

Questions Presented.

1. Whether the Court of Appeals has correctly interpreted the decisions of this Court in cases arising under the Federal Employers' Liability Act (45 U.S.C. Sec. 51) as establishing (*a*) that the plaintiff no longer has the burden of persuasion in actions for negligence, (*b*) that only the barest possibility of causation is enough to make out a case for the jury, and (*c*) that only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner and running down the suicide was enough to take the case to the jury.

2. Whether a separate appeal must be taken from an order denying a motion for new trial seasonably filed after judgment, or whether the appeal from the judgment is sufficient to bring before the Court of Appeals the question of law raised by the denial of the motion.

Statutes and Rules Involved.

The statutory provision involved is 45 U.S.C. Sec. 51. The rules involved are the Rules of Civil Procedure for the United States District Courts, Rules 50(b), 54(a), 58, 59(a), 59(b) and 73(a). The statute and the pertinent provisions of these rules are printed in Appendix A attached hereto.

Statement.

On October 11, 1954, the respondent was employed by the petitioner as a grill-car attendant on a regularly sched-

uled passenger train *en route* from Boston, Massachusetts, to New York City. As the train was entering the station at Providence, Rhode Island, the engineer made an emergency application of the brakes when a Mrs. Montell stepped from the station platform to the track in the path of the locomotive in what appeared to be an attempt to commit suicide (R. 34). It is claimed that the respondent was injured and later became insane as a result of the emergency stop of the train. The train in question consisted of two Diesel locomotives and eight cars (R. 21). The engineer testified that approximately 2 miles before the train reached Providence he had made an application of the brakes to slow down for some curves. At approximately three-quarters of a mile east of the station he made a further application of the brakes preparatory to making the regular stop at the Providence Station (R. 39). The train had gradually slowed to a speed of 13 to 15 miles per hour as it was coming into the Providence Station. The track from the east is on a right-hand curve and the station platform at the easterly end is partly on the curve. The platform is approximately 20 feet wide and, except at the extreme easterly and westerly ends, is covered by a canopy supported by posts on the center of the platform (Exhibits 1 and 2A-2F, R. 139-153). The distance between the rails of the track on which the train was approaching was 4 feet 8½ inches, and the distance between the right-hand rail and the station platform was about 2 feet. On the opposite side of the track was a picket fence located about 2 feet beyond the left-hand rail (R. 11). The engine was of the type which had a cab extending across the front part a few feet back from the extreme front end (Exhibit 3, R. 151). The engineer had a seat on the right side of the cab and the fireman sat on the left (R. 44). There was a windshield-type window across the front of the cab. As the

train proceeded the engineer noticed there were people on the platform waiting for the train, most of whom appeared to be toward the westerly end of the platform (R. 37). Between the posts which supported the canopy in the center of the platform there were some baggage trucks and ice trucks at various intervals (R. 14, 42, 107, 113). As the train proceeded along the track adjacent to that portion of the platform covered by the canopy the engineer noticed a woman stepping across the rail nearest the platform. When he first noticed her she was facing the fence. She then took another step forward toward the second rail and turned and faced the engine and stooped or knelt down (R. 33). The engineer estimated the distance between her and the locomotive when he saw her stepping across the first rail as between 30 and 40 feet (R. 36). When she took the step forward and stooped in front of the engine the engineer immediately applied his brake in emergency in an effort to avoid running over her (R. 34). The fireman testified that he saw the woman stepping over the first rail and that there was not even time for him to shout to the engineer before the brakes were applied (R. 120). Other witnesses, who were on the station platform, testified as to the conduct of this woman who stepped on the track in front of the train. Edward Brewster testified that he was standing on the platform near the fifth post from the kiosk and that a woman came up and asked about the time of the train. She then turned and walked about 20 feet east. He looked east again as the train was coming in and saw the woman on the tracks bent over, but he did not see her go onto the track (R. 108). Miss Dupere testified that she was standing about 6 feet from the stairway and saw the train coming around the bend, and saw the woman step off the platform and start to walk onto the track. The woman was already off the platform when she first saw her and was crouching as she walked to the second rail (R. 110).

Miss Bowen testified that she was standing three posts from the stairwell, saw the train approaching and noticed a woman near the fifth post put her coat on the baggage rack and step out slowly in front of the engine. She did not think the train was more than 5 feet away when she stepped onto the track (R. 113-114). James Meegan testified that he was walking along the platform from west to east and saw the woman take her coat off and put it on an ice truck as she stepped out onto the track. In his opinion the train was then 35 to 40 feet away. She walked toward the far rail and half turned toward the train, when she started to stoop. It looked as though she tried to put her head on the rail (R. 116-117).

The result of putting on the emergency brake was to cause the train to come to an abrupt stop within about 80 feet instead of the gradual stop which would have been made several hundred feet beyond the point of the accident if the emergency had not occurred (R. 39). There was testimony that when the brakes were applied the respondent was thrown against the counter but was not thrown off her feet by the sudden stop of the train (R. 59). She, however, immediately became hysterical and complained of pain in her head, and was taken back to Boston on another train (R. 50). None of the physicians or specialists who examined her according to the records felt that she had a physical injury of any consequence. There was no evidence of brain damage (R. 103). At the time of trial the respondent had developed a reaction of guilt as if she had been the cause of the death of the woman. This was called a hysterical conversion reaction by the respondent's medical expert, who also testified that this reaction was based upon a paranoid psychosis that must have existed prior to this reaction (R. 104-105).

At the close of all the evidence the petitioner presented a motion for a directed verdict, which was denied condi-

tionally by the Court (R. 133), and thereafter the jury returned a verdict in favor of respondent on January 7, 1959. Judgment was entered forthwith on the same date. Thereafter petitioner filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (R. 132). These motions were denied after hearing on the 13th day of January, 1959 (R. 133). At the hearing the trial judge made endorsements on the motions and stated the reasons for his denial of the several motions as follows (R. 133-134):

> "I am denying both motions. On the Defendant's Motion for Directed Verdict I have endorsed this: This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was "denied" but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free so to do. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959."
>
> "On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'
>
> "I wish to be a little more explicit than I am in these endorsements. In my opinion there was no evidence whatsoever of negligence on the part of the engineer.

I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not.

"With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954. In my opinion every medical practitioner of any competence would say that the kind of condition which the plaintiff now has owes its origin to factors far antecedent to the 11th of October. It may be that what happened on the 11th of October acted as a trigger, but in my view not as a legal cause. It seems to me to be as irrelevant from the point of view of causation as if on that day the rain suddenly started to dash against the windows and the plaintiff became frightened. There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

Petitioner filed notice of appeal from the judgment on February 11, 1959. The Court of Appeals in its opinion (272 F. (2d) 153, 156) noted that petitioner did not appeal from the denial of its motions for judgment notwithstand-

ing the verdict and for a new trial. The Court thereupon treated the appeal from the judgment as raising only the question of sufficiency of the evidence raised by the petitioner's motion for a directed verdict. The Court, after holding that its interpretation of recent opinions of this Court required submitting the case to the jury, ended its opinion as follows:

> "The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial." (R. 175.)

Summary of Argument.

I.

The Court of Appeals misconstrued and misapplied the opinions of this Court as establishing (*a*) that the plaintiff no longer has the burden of persuasion in actions for negligence; (*b*) that only the barest possibility of causation is enough to make out a case for the jury; and (*c*) that only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner and running down the suicide was enough to take the case to the jury.

The Court rejected the theory of negligence, advanced by the respondent, that the engineer could have seen the woman on the track in time to avoid running her down without an emergency application of the brakes, but, "with an eye to the trend indicated by recent decisions of the Supreme Court," held that there was a scintilla of evidence of negligence toward the suicide in failing to apply the

brakes immediately rather than after a momentary hesitation and that there was the faintest scintilla of evidence to suggest a causal relation between the engineer's possible negligent failure to apply the brakes sooner than he did and the running down of the suicide. The petitioner submits that the conclusions reached by the Court misconstrued the applicable opinions of this Court setting forth governing principles defining burden of proof and evidence sufficient to make out a question of negligence and causation for the jury. The Court interpreted the ruling in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, as the equivalent of the standard under which a plaintiff may recover if he adduced only the faintest scintilla of evidence on the issues of negligence and causation. To say that negligence need be only slight is not the equivalent of saying that the evidence necessary to prove that negligence need be only the faintest scintilla. See *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479. The more recent decision of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138, demonstrates that plaintiffs still have the burden of persuasion in actions for negligence under the Act. See also *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576.

Assuming that the Court of Appeals did make use of the test formulated in *Rogers* v. *Missouri Pacific Railroad Co.*, *supra*, in determining the sufficiency of the evidence to take the case to the jury, petitioner submits that it nevertheless improperly applied that test to the facts of the case before it. The Court properly rejected the contention that the train could have been stopped without an emergency application at any time after the suicide was seen or was in position to have been seen in the path of the locomotive. If baggage trucks on the platform obstructed the view of the engineer, they were an obstruction to the view of the platform where the woman would have been in a position of safety. If he had noticed her immediately before she

started to step off, she would still have been in a position of safety on the platform. It was only when she started to go onto the track that he noticed her as distinguished from other people waiting for the train. There was no evidence that the train was more than 40 feet from her when she was in a position to be seen moving onto a place of danger, that is, onto the track. The only scintilla of evidence of negligence suggested by the Court of Appeals is the failure of the engineer to attempt to bring his train to an emergency stop when he first noticed her stepping over the first rail when the engine was 40 feet away, rather than waiting until he saw her take another step forward and kneel or stoop.

Petitioner submits that, whether the engineer had applied his brakes 40 feet from the suicide or 12 feet from her, the result of the stopping would have been the same, both as to the suicide and as to the respondent. It is the fact that the train stopped suddenly and unexpectedly that is the basis of the respondent's action. The distance the train was from the suicide when the brake was applied had no causal relation to respondent's injuries. The petitioner submits that the facts of the case at bar are entirely similar to those in *Herdman* v. *Pennsylvania Railroad Co.*, 352 U.S. 518 (1957). Petitioner submits that on the facts of the case at bar there was not any substantial evidence or even a scintilla of evidence of negligence on the part of the petitioner that caused or directly contributed in any degree to cause the injury to the respondent and that the Court of Appeals clearly erred in sustaining the Court below.

II.

The respondent's appeal from the judgment of the District Court was sufficient to bring before the Court of

Appeals the question of law raised by the denial of the petitioner's motion for a new trial. The petitioner filed a motion for new trial in the alternative with its motion for judgment notwithstanding the verdict. This was in effect a separate motion and raised different issues. *Marsh* v. *Illinois Cent. R. Co.*, 175 F. (2d) 498. The trial judge denied the motion, not as an exercise of discretion, but on the ground that the Court construed the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. This amounted to a ruling of law and not an exercise of discretion. *Garrison* v. *United States*, 62 F. (2d) 441 (4 Cir. 1932); *Magee* v. *General Motors Corp.*, 213 F. (2d) 899 (3 Cir. 1954).

The Court of Appeals declined to consider the question raised by the denial of the motion for a new trial for the reason that "the defendant did not appeal from the denial of its motion for a new trial." The petitioner submits that the appeal from the judgment was all that was required to bring before the Court the issues raised by these post-judgment motions. The rule established by the First Circuit in the case at bar is contrary to the rule established by this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). It is also contrary to the rule established in other circuits. See *DiGiovanni* v. *DiGiovannantonio*, 233 F. (2d) 26 (C.A. D.C. 1956). It is even contrary to earlier opinions in the First Circuit. *Sears* v. *Pauly*, 261 F. (2d) 304, 307 (1 Cir. 1958). The petitioner submits that the rule established in the case at bar requires that separate appeals be taken from any post-judgment motion and that in formulating this rule the Court was in error.

Argument.

I.

THE COURT OF APPEALS MISCONSTRUED AND MISAPPLIED THE OPINIONS OF THIS COURT AS ESTABLISHING (*a*) THAT THE PLAINTIFF NO LONGER HAS THE BURDEN OF PERSUASION IN ACTIONS FOR NEGLIGENCE; (*b*) THAT ONLY THE BAREST POSSIBILITY OF CAUSATION IS ENOUGH TO MAKE OUT A CASE FOR THE JURY; AND (*c*) THAT ONLY THE FAINTEST SCINTILLA OF EVIDENCE TO SUGGEST THE INFERENCE OF ANY CAUSAL CONNECTION BETWEEN THE ENGINEER'S POSSIBLY NEGLIGENT FAILURE TO APPLY THE BRAKES SOONER AND RUNNING DOWN THE SUICIDE WAS ENOUGH TO TAKE THE CASE TO THE JURY.

The Court of Appeals, "with an eye to the trend indicated by recent decisions of the Supreme Court" (R. 17), affirmed the ruling of the trial judge. That Court, although rejecting the theory of negligence advanced by the respondent, upheld the Court below and indicated that by the faintest scintilla of evidence the jury might have found negligence toward the woman on the track, not because the engineer could have seen her in time to stop without an emergency application of the brakes, but because he hesitated momentarily in applying the brake when he did see her. And although the Court could discern only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possible negligent failure to apply the brakes sooner than he did, and the running down of the suicide, it felt, as it read recent decisions of the Supreme Court, that the plaintiff had shown enough to take her case to the jury.

The petitioner submits that in reaching these conclusions the Court of Appeals has misconstrued and misapplied applicable opinions of this Court setting forth the governing principles defining proof which requires submission to the jury of both questions of negligence and

causation in cases arising under the Federal Employers' Liability Act.

Despite occasional reference in dissenting opinions of this Court to the contrary, the Court has never held that the proper test to be applied as to the sufficiency of evidence to warrant submitting a case to the jury, *i.e.*, "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (*Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 506, 507), was in effect the equivalent of a standard under which the plaintiff may recover if he adduced only the faintest scintilla of evidence on the issue of causation. To say that negligence need be only slight is not the equivalent of saying that the evidence necessary to prove that negligence need be only the faintest scintilla. See in this respect *Brady* v. *Southern Railway Co.*, 320 U.S. 476, where the Court said at page 479: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury."

In the more recent decision of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138; 4 L. ed. (2d) 198, 1959, the Court, in applying the test of *Rogers* v. *Missouri Pacific Railroad Co.*, *supra*, to the facts of the case before it, demonstrated that the correct norm for decision did not, as the Court of Appeals claims, permit an abandonment of the rule that plaintiffs have the burden of persuasion in actions for negligence under the Act. Thus, at page 140 of its decision, the Court said: "The burden of proving that the crossing was an unsafe place to work was on petitioner." In addition the Court also uses language in the decision which militates against its acceptance as a proper rule of decision the rule that the faintest scintilla of evi-

dence of negligence or causation is enough to take the case to the jury. Illustrative of this point are the following excerpts from the decision:

> "In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.
>
> . . . . . .
>
> "In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

See also *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576, where the Court says:

> "The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged."

Thus the petitioner submits that the Court of Appeals erroneously construed the decisions of this Court in holding that the tests enunciated by it in determining the sufficiency of the evidence were tantamount to a requirement that only the barest possibility of causation be present to make out a case for the jury, and that the plaintiff is relieved of its traditional burden of proof in suits for negligence under the Federal Employers' Liability Act.

It cannot be argued that the various expressions of the Court of Appeals in its opinion, such as "barest possibility of causation," "faintest scintilla of evidence," etc., are just dicta in terms of attempted paraphrases of the proper test and that as such they did not enter into the decision, since in its opinion the Court expressly states (R. 173) that it "can discern from the engineer's testimony [the testimony upon which it relies exclusively to supply evidence of negligence and causation] only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, . . ."

Assuming that the Court of Appeals did make use of the test formulated in *Rogers* v. *Missouri Pacific Railroad Co., supra,* in determining the sufficiency of the evidence to take the case to the jury, the petitioner submits that nevertheless it improperly applied that test to the facts of the case before it.

The respondent alleged in her complaint that the petitioner negligently caused the train to come to a sudden and unexpected stop, causing injuries to her (R. 3-4). It has consistently been the respondent's contention that the engineer could or should have seen the woman on the track in time to bring his train to a gradual stop before reaching her, without the necessity of any emergency application of the brakes, and that the sudden stop of the train could have been avoided (R. 124, 172). Any contention that the emergency application might have been avoided if the woman had been seen by the engineer before she left the platform is without any factual support. Also the fact that the engineer testified that baggage trucks on the platform may have obstructed his view of the platform is not a fact that could have any causal relation to this accident. If the engineer had seen the woman sooner than he did, she

would have been on the platform in a safe position, presumably a passenger waiting to take the train. There was no unusual situation in the operation of the train or in the presence of the persons on the platform until Mrs. Montell left the safety of the platform and placed her body within the path of the train. While she was on the platform, even though she was standing close to the edge, she was still in a position of safety and the engineer would have had no reason to believe that she would deliberately step in front of the engine. The evidence does not warrant a finding that any truck obstructed the view of the portion of the platform on which the woman necessarily must have been standing just before she stepped onto the tracks and at the time she stepped onto the tracks. The testimony of witnesses who saw her is all to the effect that her leaving the platform and stepping onto the track was one continuous movement (R. 110-113, 117). It must be borne in mind that both the time and the distances were very short. The woman would have taken, at most, one step from the place of safety on the platform to the place of danger on the tracks, and it was while she was taking this step or a second step that the engineer first noticed her. The distance from the edge of the platform to the far rail was less than 7 feet. In going from the platform toward the farthest rail the woman would not have taken more than three normal steps from the time she left the safety of the platform until she assumed a crouching position between the rails in front of the locomotive. There was not a bit of evidence to support an argument that from the time the woman was first in any position of danger the train could have been stopped without an emergency application of the brakes.

The Court of Appeals properly rejected respondent's contention that the train could have been stopped without an emergency application, nor does it appear that the trial judge found any factual basis for this contention, since he

clearly stated that upon the record he could find no negligence on the part of the engineer.

The only scintilla of evidence of negligence suggested by the Court of Appeals is the failure of the engineer to attempt to bring his train to an emergency stop immediately upon seeing the suicide on the track 40 feet away rather than waiting, as the Court reasons he must have done, until he was within about 12 feet from her. It is submitted that in the time necessary for the engineer to react to the situation which suddenly confronted him, with the train traveling at a speed of 20 feet per second, the train would have traveled the distance it did before a brake application could reasonably be expected to be made. The Court below seems to indicate that the duty owed to the suicide required the engineer to make a sudden stop in an attempt to avoid running over her as soon as he saw her stepping onto the track. The negligence relied on by the respondent in her complaint is "negligently operating said train causing it to come to a sudden and unexpected stop." These are two bases of negligence arising out of two conflicting duties to two different persons. It is difficult to see any causal relation between the momentary hesitation on the part of the engineer, if that may be considered negligence toward the suicide, and the negligence relied on by the respondent in her complaint.

Whether the engineer had applied his brakes 40 feet from the suicide or 12 feet from her, the result of the stopping would have been the same both as to the suicide and as to the respondent. It is the fact that the train stopped suddenly and unexpectedly that is the basis of the respondent's action, and the distance the engine was from the suicide when the brakes were applied has no causal relation to the respondent's injuries.

The stopping of the train was sudden and unexpected, but that was not negligence toward the respondent in the

circumstances of this case. *Herdman* v. *Pennsylvania Railroad Co.*, 352 U.S. 518 (1957).

The defendant submits that the situation in the case at bar is entirely similar to that in the case just cited. That case involved an injury to a conductor riding in a caboose when the engineer brought the train to a sudden stop to avoid striking a motor vehicle at a grade crossing. The trial judge had directed a verdict for the defendant and the Court of Appeals affirmed (228 F. (2d) 902). This Court also affirmed, stating at page 520:

> "We agree with the lower courts that the jury question of negligence was not presented by the proofs."

The defendant submits that on the authority of the *Herdman* case the trial judge could have and should have allowed the defendant's motion for a directed verdict and its motion for a judgment notwithstanding the verdict.

If it be argued that in the *Herdman* case the doctrine of *res ipsa loquitur* was relied upon, the petitioner submits that the method of proof relied on in that case to prove negligence does not alter either the facts or the legal principles of negligence involved. There, as in the case at bar, the circumstances of the sudden stop fully appear. The burden which the plaintiff had to sustain was proof of negligence, and the Court held that that burden had not been sustained.

On the facts accepted by the Court of Appeals as the established facts of the case the conclusion cannot be reasonably drawn that negligence on the part of the railroad played any part, ever so slight, in the injury of the plaintiff below. From a reading of the opinion it is clear that the Court recognizes as established the fact that, "when the suicide stepped off the platform onto the track," "the

front of the locomotive was not more than 40 feet away." The Court also appears to accept as established that an emergency application of the brakes could not bring the train to a stop in less than 80 feet.* Yet on this state of the record the Court comes to the incredible conclusion that the jury might have found that an application of the brakes when the engineer first saw the suicide on the tracks, *i.e.*, 40 feet from the Diesel, somehow might have brought the train to a stop soon enough to avoid hitting the woman. It is inescapable that the Court arrives at this conclusion, albeit by a somewhat circuitous route. Thus from its consideration of the evidence the Court states that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone. To support this statement, the Court finds evidence of negligence in that it could be inferred from the engineer's testimony that he did not apply the brakes as soon as he should have. The Court admits that "The engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her" (R. 174). To supply that lack, however, the Court states that it can discern from the engineer's testimony a scintilla of evidence, even though it be the faintest, to suggest the inference of a causal connection between the engineer's failure to apply the brakes sooner than he did and running down the suicide. When it comes to actually demonstrating what that scintilla is, the Court never does set forth a possible factual hypothesis on which the engi-

*The Court of Appeals does not treat as negligence in and of itself the emergency application of the brakes.

neer could have avoided running over the woman, but takes refuge in "recent decisions of the Supreme Court." Thus it appears that, if there is a scintilla of evidence in this case, it is a scintilla supplied by the so-called recent trend of Supreme Court decisions, not by the facts of the case.

It might be argued that implicit in the Court's decision on the facts is a rejection of the engineer's testimony as to the distance which it would take the train to stop upon an emergency application of the brakes. Thus, if the train could be stopped in an emergency in 20 feet, 30 feet, or in any distance short of 40 feet, then, in the light of the other undisputed evidence, it would indeed be proper to say that there was a causal connection between the failure to apply the brakes sooner and the running over of the suicide. The only difficulty is that there is no evidence in the record on the distance required for an emergency stop other than that supplied by the engineer's testimony. So, if that testimony is rejected, then there is a complete lack of evidence on this point and for the jury to make a finding it would have to indulge in conjecture. As the Court stated in *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576, ". . . disbelief of the engineer's testimony would not supply a want of proof." Thus the only credible evidence is that the train could not be stopped in less than 80 feet. Indeed, the following language in the Court of Appeals decision seems to demonstrate that the Court is committed without qualification to acceptance of that fact. "It is true that no eye witness to the tragedy, and there were several, placed the front of the locomotive more than 40 feet away, about half the distance in which the *train could possibly be stopped*, when the suicide stepped off the platform onto the track" (R. 173-174). (Emphasis supplied.) On the state of the facts accepted by the Court of Appeals we might ask ourselves, in the words of Justice Whittaker in his concurring opinion in *Inman* v. *Baltimore & Ohio Rail-*

road Co., cited, *supra*, "how could [the petitioner] have prevented the casualty?"

The petitioner submits that on the facts of this case there was not any substantial evidence, or even a scintilla of evidence, of negligence on the part of the petitioner that caused or directly contributed in any degree to cause the injury of the plaintiff below. Consequently the Court of Appeals clearly erred in deciding the case.

II.

THE APPEAL FROM THE JUDGMENT WAS SUFFICIENT TO BRING BEFORE THE COURT OF APPEALS THE QUESTION OF LAW RAISED BY THE DENIAL OF THE PETITIONER'S MOTION FOR A NEW TRIAL.

The petitioner filed a motion for a new trial in the alternative with its motion for judgment notwithstanding the verdict. This was in effect a separate motion and raised different issues. *Marsh* v. *Illinois Cent. R. Co.*, 175 F. (2d) 498. The trial judge denied this motion, not as an exercise of discretion, but on the express ground "that this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion" (R. 133). This amounted to a ruling of law that the trial judge lacked the power to allow the motion in the exercise of his discretion. The issue, therefore, before the Court of Appeals was not one of abuse of discretion, but rather the power of the trial judge to exercise his discretion to set aside the verdict and grant a new trial. *Garrison* v. *United States*, 62 F. (2d) 441, 442 (4 Cir. 1932). *Magee* v. *General Motors Corp.*, 213 F. (2d) 899 (3 Cir. 1954).

In the case last cited the trial judge had denied a motion for a new trial for reasons similar to those given by the

trial judge in the case at bar. The Court of Appeals said (p. 900):

> "While this was the proper standard to apply to the disposition of the motion for judgment notwithstanding the verdict, its application to the new trial motion amounted to an abdication of the judge's functions with respect to that motion. The case must go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors. Among these would obviously be the views of the trial judge expressed at the time the verdict was rendered."

The Court of Appeals in the case at bar, however, took the position that the question relating to the denial of the motion for a new trial was not before it, "for the defendant did not appeal from the denial of its motion for a new trial" (R. 175). The jury returned a verdict on January 7, 1959. Judgment was entered forthwith in accordance with Rule 58. The motion for new trial was filed January 12 and was denied January 13. The defendant thereafter seasonably appealed from the judgment (R. 135). The point was relied on by the appellant on appeal (R. 166). Was it also necessary for it to file a second appeal from the order on the motion to carry the question of law raised by the order to the Court of Appeals? The ruling of the Court of Appeals appears to indicate that a separate appeal from any post-judgment order is now required in the First Circuit.

This practice is contrary to that prescribed by the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). There the Court said (p. 253) that an appeal would lie, ". . . not from his order denying a new trial, for that order, save in most exceptional circum-

stances, is not appealable, but from the judgment entered on the verdict, for errors of law committed on the trial."

The practice now required in the First Circuit also appears to be in conflict with that in other circuits.

The exact situation as in the case at bar was involved in *DiGiovanni* v. *DiGiovannantorio*, 233 F. (2d) 26 (C.A. D.C. 1956). There the Court said (p. 28):

> "It is argued that Gabriel did not appeal from the denial of a new trial, since the notice of appeal ran literally only from the order of March 10, 1955 granting the letters of administration. We think the argument cannot be sustained. The motion was filed within 10 days of the entry of judgment; it was clearly a motion under Rule 59 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and was part of the same proceeding which produced the judgment from which Gabriel appeals. Until that motion was disposed of, the judgment lacked the finality requisite for appeal. Thus the order denying the motion for a new trial is a ruling that produced and is included within the final judgment and on appeal from that judgment properly brings the order before the reviewing Court."

The following cases show that the same practice as that in the District of Columbia is followed in other circuits:

Green v. *Reading Co.*, 180 F. (2d) 149, 150 (3 Cir. 1949).

Texas & New Orleans R.R. Co. v. *C. A. Underhill*, 234 F. (2d) 620, 623 (5 Cir. 1956).

Ford Motor Co. v. *Busam Motor Sales, Inc.*, 185 F. (2d) 531, 533 (6 Cir. 1950).

Bass v. *B. & O. Terminal R. Co.*, 142 F. (2d) 779, 780 (7 Cir. 1944).

Buder v. *Fiske*, 174 F. (2d) 260, 265 (8 Cir. 1949).
Agostino v. *Ellamar Packing Co., Inc.*, 191 F. (2d) 576, 577 (9 Cir. 1951).
Marshall's U.S. Auto Supply Co. v. *Cashman*, 111 F. (2d) 140, 141 (10 Cir. 1940).

Until the decision in the instant case the First Circuit, while permitting appeals from orders on motions for new trials in certain unusual circumstances (*Aberlin* v. *Zisman*, 244 F. (2d) 620 (1 Cir. 1957)), had recognized that the proper method of appealing from such orders was by an appeal from the judgment.

Sears v. *Pauly*, 261 F. (2d) 304, 307 (1 Cir. 1958).

It appears that, in order to permit appeals in cases where the appellant had lost the right to appeal from the judgment (*Aberlin* v. *Zisman*, *supra*) or had mistaken its remedy (*United States* v. *Best*, 212 F. (2d) 743, 744, footnote (1 Cir. 1954); *Creedon* v. *Loring*, 249 F. (2d) 714, 717 (1 Cir. 1957)), the Court had permitted appeals from the post-judgment orders as the "final decision" in the case. The following significant language appears in the footnote to the *Best* case: "Strictly, we think, the appeal should have been taken from the original judgment of June 10, 1953, not from the order denying the motion for rehearing."

The case of *Peterman* v. *Indian Motorcycle Co.*, 216 F. (2d) 289 (1 Cir. 1954), may point the way to the result in the Court below in the instant case, but it is significant that the Court in *Sears* v. *Pauly*, *supra*, referred to that case as giving a choice between appealing from the judgment itself and the order denying the motion, and held that an appeal from the judgment in the *Pauly* case was properly taken.

It now seems clear that what started as an exception to the general rule in permitting appeals in hardship cases from the post-judgment motions has become the rule in the First Circuit. Those appeals, at first permissive, have now become mandatory. The practice of appealing from the judgment is no longer a simple method of protecting a litigant's rights, but has become a trap for the unwary.

Conclusion.

The petitioner respectfully requests that this Court reverse the judgment entered in the Court of Appeals and order judgment for the petitioner, or, in the alternative, if this Court rules that a question was presented for the jury, the petitioner requests that the Court reverse the judgment below and remand the case for further proceedings upon the petitioner's motion for a new trial.

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Appendix A.

UNITED STATES CODE (1952 EDITION).

45 U.S.C. Sec. 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Rule 50. Motion for a Directed Verdict:

. . . . . .

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 54. Judgments; Costs:

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58. Entry of Judgment:

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; . . . The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 59. New Trials; Amendment of Judgments:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Rule 73. Appeal to a Court of Appeals:

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under

Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

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In the

Supreme Court of the United States

October Term 1961

No. 38

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

BRIEF FOR RESPONDENT HENAGAN

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Respondent.

BRIEF FOR RESPONDENT HENAGAN

Questions Presented

1. Is the evidence sufficient to support the verdict?

2. Does error appear in regard to the railroad's motion for new trial?

Statement

Petitioner's statement omits the relevant matter summarized below.

The engineer Crafts testified that he did not see the

deceased woman (Mrs. Montell) step off the platform because his view was blocked by a baggage-truck and an ice-truck on the platform. (R. 14, 17-18, 28-29.)

Exhibit 1A (R. 107, 153) is a drawing (to the scale 1 inch = 20 feet) of the track, platform, canopy, supporting posts and fence. There are two kiosks or stairways shown on Ex. 1A; the accident happened east of the east kiosk. From the east edge of the east kiosk it is approximately 370 feet to the east end of the canopy, and 560 feet (measured along the slightly curving platform) to the east end of the platform. To the east of the east kiosk Ex. 1A shows a line of 13 posts supporting the canopy, the 13th being about 5 feet from the east end of the canopy. East of the 11th post, and west of the 12th, Ex. 1A shows a crossing, about 10 feet wide, leading south from the platform, across the track, to a gate in the picket fence. Exhibit 1A shows the following distances:

From the east edge of the east kiosk to:

5th post	130 feet
6th post	160 feet
11th post	310 feet
west side of crossing	320 feet
east side of crossing	330 feet
12th post	340 feet

The witness Brewster testified that just before the accident he was standing at the 5th post waiting for the train here involved, that Montell talked to him briefly there and then moved about 20 feet "to his left", that is to the east. (R. 107-109; Brewster marked the 5th post on Ex. 1A, R. 109.)

The engineer testified that the baggage-and ice-trucks which blocked his view were at ". . . the east end of the

station . . . before you get to that canopy . . ." (R. 30.) Examining Ex. 2A (R. 8-9, 139), a photograph which looks east (R. 10), he testified the trucks were "just the other side of this crossing here." (R. 42.)

Mrs. Montell "stepped out slowly" (R. 110), "walked over to the second rail of the track" (R. 110, 117) and, according to the witness Nelson, proceeded to the fence. (R. 115.) There was at that point no opening in the fence, as the engineer knew. (R. 34.) The engineer testified that he observed her from the time she stepped over the rail nearest the platform but did not apply the brake until Montell turned and kneeled in front of the engine. (R. 34-35.) He then immediately put the brake into the last, or emergency notch, and left it there. (R. 27.)

At the time of the accident the plaintiff Henagan, a waitress employed by the defendant railroad, was standing at a counter in the forward part of the rear car of the train. (R. 46, 48-49, 55.) The train came to a stop, as a result of which all objects on the tables were thrown to the floor (R. 48, 57), and a fellow-employee, Driscoll, was thrown to the floor 20 feet away from where she had been standing in the rear of the car. (R. 54.) Driscoll, who had been employed in the same work since 1946 (R. 55), testified that normally the vibration of air in the brakes gives warning of a stop, but that in this case there was no warning whatsoever: "Just a sudden stop. Period." (R. 56-57.)

Immediately after the stop the plaintiff Henagan complained of pain, could not move her neck, was hysterical, could not continue to work, and was removed from the train. (R. 50.) The witness Steinfeld, who was not scheduled to work that day, immediately took over her job. (R. 46, 50.) Her father testified that he was at the station when she was brought to Boston; that she was then wearing a plastic collar round her neck; that she "didn't say a word", and did not recognize him until the day after

the accident; that he took her to the hospital where she was in the emergency ward for nine hours, and in the hospital for three weeks, that "they put her in traction" and "she was all tied up". (R. 63-65.) The hospital record shows the diagnosis "Acute neck strain. Hysterical reaction." (Ex. 6, R. 158, 160.) At a second hospitalization in 1957 the diagnosis was "Cervical radiculitis, with psychosomatic overlay." (Ex. 6, R. 158, 163.)

Ex. 7A (R. 164-165) shows that she worked as an employee of the defendant railroad in the year 1954 at the average rate of approximately $64.00 per week.

Prior to the accident the defendant was in good health, happily married, the mother of a twelve year old boy. She was active in outdoor sports, including Little League activities. (R. 72-73.)

A psychiatrist, whose qualifications were not challenged, testified that the plaintiff Henagan had no discoverable past history of mental disorder (R. 95); that she had an essentially normal school history, work history, history as a wife and mother (R. 98); that at the time of trial she was of unsound mind and incapable of remunerative employment (R. 84-85); that her appearance in the courtroom would in all probability cause her further serious injury because she believed that this case was a prosecution against her for the death of Montell. (R. 85, 86.) In his opinion she was suffering from paranoia, "a mental disease characterized by suspiciousness, by the presence of ideas of guilt and reference to one's self of events not connected with on's self." In the opinion of the expert witness her disease was caused by the accident of October 11, 1954 (R. 94-97.) Symptoms of the disorder became apparent shortly after the accident in the form of suspicion and hostility by the plaintiff toward her father, husband, son, and her mother, who died shortly before the trial of this case. (R. 65-69, 74-77, 98-99.) The psychiatrist testified that in his opinion

the disorder has become worse with the passage of time; that plaintiff is a very difficult patent to treat; that it is doubtful that her condition can be improved by treatment; that the only possibility of successful treatment would involve her residence in a hospital for a period of a year, at least, at a charge of thirty dollars per day, plus four or five psychiatric treatments per week at a cost of twenty dollars per treatment. (R. 87-90, 91-92.) It is agreed that plaintiff's life expectancy on the day of the accident was 34.6 years. (R. 155.)

The ruling of January 13, 1959 on the motion for judgment or for new trial was made at a hearing in open court (R. 155-157). In arguing the motion for judgment counsel for the railroad urged there was no evidence of negligence.

The trial court said:

> "You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier." (R. 156.)

Shortly thereafter the following occurred:

> "Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.
>
> The Court: This is a perfect case which I would be very happy to see nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.
>
> Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that it is all the stronger

case for a Motion for New Trial because I think it is apparent that the jury in this case disregarded the law as given by your Honor.

The Court: I cannot say that. I can only say that if this were a case in which a verdict was permissible for the plaintiff, then I don't think they disregarded my instructions. I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but I am not going to help you much here.

Mr. Deering: Well, then perhaps in view of that there is no need for me to continue further. (R. 157.)

Summary of Argument

A. Sufficiency of the Evidence.

How far was the engineer from Montell when she stepped off the platform? The Court of Appeal accepted his testimony that he was only 40 feet away. We cannot do so—we are entitled to the strongest, not the weakest, evidence. Let us ask a few questions:

1. Did the engineer see Mrs. Montell as she stepped off the platform?

   Answer: He says that he did not see her. (R. 14, 17-18, 21, 28-29.)

2. Was there an obstacle which blocked his view?

   Answer: He says that his view of Montell, as she stepped from the platform, was blocked by baggage-trucks on the platform. (R. 14, 17-18, 28-29.)

3. Does it follow that the baggage-trucks were closer to Montell than the engineer was, as she stepped from the platform?

   Answer: Yes, obviously.

Clearly the jury can't be criticized for inquiring about the distance between Montell and the baggage-trucks. The jurors would naturally ask:

4. Do we have a scale-plan of the track and platform?

   Answer: Yes, Exhibit 1A (R. 107, 153).*

5. Can we locate Montell on Ex. 1A?

   Answer: Yes. The witness Brewster said that he waited for the train at the 5th post east of the east kiosk or stairway and talked with Mrs. Montell there. Just before the train came she moved 20 feet to his left, which means 20 feet east, since he would be facing south waiting for the train. He marked the 5th post on Ex. 1A. (R. 107-109.)

6. Can we locate the baggage-trucks on Ex. 1A?

   Answer: Yes. The engineer says they were at the east end of the platform. (R. 30.) Later he said they were just to the east of the east crossing shown here on Ex. 1A—it's between the 11th and 12th posts. (R. 42; Ex. 1A.)

7. Here's a ruler—how far is it from the 5th post to the east side of the crossing?

   Answer: 10 inches—that means 200 feet. The scale is 20 feet to an inch.

8. If we subtract the 20 feet that Montell moved after talking to Brewster at the 5th post, that means she was 180 feet from the baggage-trucks when she stepped off the platform?

   Answer: Yes. At least 180 feet.

9. Then the engineer was even farther away from her when she stepped off the platform?

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* The relevant part of Exhibit 1A is reproduced as Appendix A of this brief, the scale having been preserved so that measurements may be made. On Appendix A we have indicated the position of Montell and the baggage-trucks, as shown by the testimony of Brewster and the engineer.

Answer: Certainly. Otherwise the baggage-trucks would not have blocked his view.

Clearly the engineer's testimony, or guess, rather, that he was but 40 feet away, is exploded. But the jury's job is not finished:

10. We know he was more than 180 feet from Montell as she stepped off the platform. But where was he when he could first see her, when his view became unblocked?

    Answer: The baggage-trucks on the platform would no longer block his view once he drew abreast of them.

11. When and where was that?

    Answer: When he got to the east crossing and was 180 feet away from Montell. From there on the track is straight and nothing could block his view of Montell on the track.

12. Then, as he was going about 20 feet per second (13-15 m.p.h.; R. 12) he could have seen her for 9 seconds before he hit her?

    Answer: Yes.

13. And if he had been careful he would have seen Montell when he was 9 seconds away, and would then have started to apply his brakes to slow the train down?

    Answer: Yes.

14. If he had started to apply his brakes gradually when he was 9 seconds away the plaintiff, who was standing in the grill-car, would have been warned by the vibration of air in the brakes, would she not?

    Answer: That is the testimony of her fellow-employee Driscoll. (R. 56.)

15. It appears from the engineer's testimony that for 8 of the 9 seconds he did nothing, and then put the brake into emergency, causing a violent and sudden stop, with no warning to the plaintiff?

Answer: Yes. He says he put the brake over to the last notch and left it there. (R. 27.) Everything on the tables in the grill-car was thrown to the floor (R. 57), and the witness Driscoll was thrown 20 feet to the floor. (R. 54.) Driscoll says there was no warning: "Just a sudden stop. Period." (R. 56-57.)

If this were an action at common law by a passenger who was seated in the train, the evidence would clearly make out a case for the jury. *Dorr* v. *Lehigh Valley R.R.*, 211 N.Y. 369, 373-374. Here the exposed position of the plaintiff, required by her employment as a waitress, makes out a much stronger case.

B. Motion for New Trial.

Does an appeal from a judgment bring up error in a post-judgment order denying a motion for new trial? Two types of cases may arise:

1. Cases where the denial was an *abuse of discretion.*
2. Cases where the denial was a *failure to exercise discretion.*

In cases of the first type it will appear on a proper appeal that the motion, as a matter of law, must be granted. The appellate court can accomplish this only by reversing the judgment. An appeal from the judgment, therefore, is the necessary and proper method of carrying up this kind of error. *DiGiovanni* v. *DiGiovannantonio*, 233 F.(2d) 26.

In cases of the second type, however, it will not appear on a proper appeal that the motion must be granted, but only that it must be heard and decided. It is therefore neither necessary nor proper to reverse the judgment. Since correction of the error in no way affects the judgment, the proper appeal is not from the judgment but from the order denying the motion. *Magee* v. *General Motors Corp.*, 213 F.(2d) 899. *John E. Smith's Sons Company* v. *Lattimer Foundry and Machine Company*, 239 F.(2d) 815.

The case at bar is obviously of the second type. The kind of error petitioner claims here, a denial of the motion because of lack of power to grant it, would, if shown on a proper appeal, call for an order to the trial judge to hear and decide the motion. It would not call for a reversal of the judgment. Since the correction of the error in no way affects the judgment, an appeal from the judgment is not the proper way to bring it up. The Court of Appeal was precisely correct in its disposition of petitioner's appeal: *The judgment of the District Court is affirmed.* (R. 174.)

In any case petitioner has shown no error. The motion for new trial was not denied; it was waived in open court. At the hearing on January 13, 1959, the District Judge ruled that the jury had not disregarded his instructions. (R. 157.) He made it clear to counsel that the only question in his mind was whether as a matter of law "a verdict was permissible for the plaintiff." (R. 157.) As to that question he stated:

> "... I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but *I am not going to help you much here.*" (R. 157; emphasis added.)

After being thus told that the motion for new trial would not be granted, counsel for petitioner ceased to press that motion on any ground:

"Well, then perhaps in view of that there is no need for me to continue further." (R. 157.)

In view of this the District Judge had every right to think, and undoubtedly did think, when he disposed of the motion, that the only part of it which was still before him was the motion for judgment.

Finally, if any error occurred, petitioner was present in court when the ruling was made, and was bound, under Rule 46, to call it to the court's attention. If petitioner's counsel had done so there can be no doubt that the inadvertence would have been immediately corrected. In the circumstances the Court of Appeal was not bound to take notice of this alleged error urged for the first time on appeal.

Argument

I. There Is Ample Evidence to Support the Verdict.

This case is a strange compound of tragedy and geometry. One woman, Montell, is killed on the track. The other, the plaintiff Henagan, is physically injured by the violent stopping of the train, and caused, in the sequel, to believe that she is responsible for Montell's death. Here is a poor engineer, says the railroad, caught between these unbalanced females. What was he to do, it asks, when a madwoman threw herself in front of his train when he was but 40 feet away?

Nothing of the sort happened. Mrs. Montell did not plunge in front of the train—she *walked*. She *walked* on the track for 11 seconds at least before she was hit, and during 9 of those seconds she could have been seen by the engineer.

The basic geometry we shall discuss is established by Ex. 1A (R. 107, 153), a scale-plan of the track and platform. We have reproduced the relevant part of that exhibit

in Appendix A of this brief taking care to preserve its scale. With that before us, we ask, as the jury did: *How far was Montell from the engineer when she stepped off the platform?* The railroad says the situation was thus:

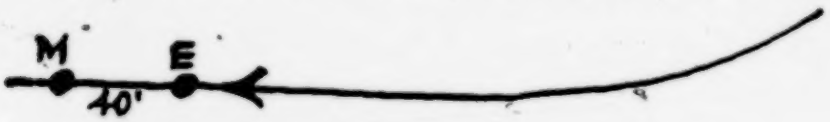

FIG. 1

This ignores vital evidence: *the engineer himself testified that he did not see M step off the platform because his view was blocked by a baggage-truck and an ice-truck on the platform.* (R. 14, 17-18, 28-29). The true geometry is not that of Figure 1. It is the following:

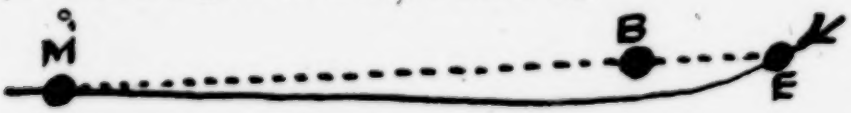

FIG. 2

Here B represents the baggage- and ice-trucks, and the dotted-line is the interrupted line of vision of E. An elementary law of optics, perceived and applied by the jury, tells us that MBE is a straight line. An equally elementary law of geometry shows that the distance ME must exceed the distance MB.

The jury had evidence before it from which it could locate M and B on Ex. 1A. First, as to M: the witness Brewster testified that he arrived on the platform via the stairway in the east kiosk shown on Ex. 1A; that he proceeded east to the fifth post and waited for the train; that Mrs. Montell engaged him in conversation and then moved to his left "about 20 feet or so". (R. 107-109; Brewster marked the fifth post on Ex. 1A, R. 109.) We submit that the jury could find that M left the platform between the fifth and sixth posts at the point we have indicated on Appendix A of this brief.

The engineer himself testified that the baggage-and ice-trucks which blocked his view were at ". . . the east end of the station . . . before you get to that canopy . . ." (R. 30.) Examining Ex. 2A (R. 139), a photograph which looks east (R. 10), he said the trucks were "just the other side of this crossing here" (R. 42). We submit that the jury could find that they were anywhere between the east crossing shown on Ex. 1A and the east end of the canopy. We have, on Appendix A, located them at the spot most favorable to the railroad: just to the east of the crossing at the edge of the platform.

Having located M and B on Ex. 1A the jury could draw a straight line through them and prolong it till it intersected the right hand-rail (Appendix A). It could find that E was at this intersection when M stepped off the platform. It could measure ME and find it to be 11 inches or 220 feet. *The jury could properly conclude that when M stepped off the platform, E was 220 feet, or 11 seconds away,* his speed being 13-15 miles per hour (R. 12):

FIG. 3

Unless he was at that point, his view of Montell, as she stepped from the platform, would not have been blocked.

So far E has not seen M. *When could he first have seen her?* Obviously when he drew abreast of the obstacles on the platform:

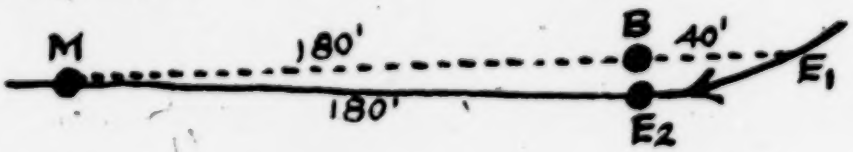

FIG. 4

(Approximately 2 seconds elapse between Figure 3 and Figure 4.) *The jury could properly find that when E got to the east crossing* (Ex. 1A; Appendix A) *he had a clear view of M on the track, and that M was then 180 feet or 9 seconds away.*

Clearly the jury could find that M was on the track for some 11 seconds before she was struck. No one says she plunged or jumped in front of the train. On the contrary: "she stepped out slowly" (Bowen, R. 113), "she walked toward the farther rail" (Meegan, R. 117; Dupere, R. 110). One witness says she went to the fence (Nelson, R. 115), before she turned back and kneeled, or squatted, or fell in front of the engine. For 9 seconds E saw or should have seen these movements, which indicate an obvious suicide, or perhaps merely a bewildered woman approaching a fence in which, *to E's knowledge,* there was no opening (Crafts, R. 34).

E took no action whatsoever during 8 of the 9 seconds. He then woke and brought the train to a sudden and violent stop. This would clearly take the case to the jury even in an action by a passenger at Common Law.

Dorr v. *Lehigh Valley R.R. Co.,* 211 N.Y. 369, 373-374.

The present case is stronger still, for it involves liability, not to a seated passenger, but to an employee whose duty as a waitress required her to stand. She was thus, to the knowledge of the railroad, peculiarly vulnerable in case of a sudden stop. Furthermore, had there been a partial application of the brakes preceding the final stop, she would have been warned of the danger, as the jury could find from testimony of her fellow-employee, Driscoll:

> "Q. Have you become aware as a general matter when a train stops in your experience—do you become aware of that stopping in some way? A. Well,

only through vibration, feeling the air going on the train for brakes; you feel a sudden vibration which you are quite used to, even approaching every stop you feel a certain vibration. You're acclimated to that.

• • •

"Q. Generally, when brakes are applied when the train comes to a stop, are you made aware of it through some kind of vibration? A. Yes.

"Q. Which occurs before the train finally comes to a stop? A. Yes." (Driscoll, R. 56.)

Here there was no warning whatsoever:

"Q. Now did anything of that kind happen in this particular case on October 11, 1954? A. No. No, it was a sudden stop.

• • •

"The Court: Just a moment. You are being asked there was no vibration before this train came to a stop.

"The Witness: No. None that I remember of, your Honor. Just a sudden stop. Period." (Driscoll, R. 56-57.)

The Railroad's Position

The rail-oad entirely omits from its "Statement" (Def. Brief 2-8) the engineer's testimony that his view was blocked. Counsel saw, however, that the testimony would not simply go away. If the engineer's view of Mrs. Montell was blocked when he was 220 feet away, they now say, it was blocked at a time when nothing important was happening. Had no trucks been there he would have seen Mrs. Montell "... on the platform in a safe position, presumably a passenger waiting to take the train." (Def. Brief 15-16.)

The engineer directly contradicts this proposition, for

he says that the trucks prevented him from seeing Mrs. Montell *as she stepped from the platform:*

> Q. . . . Here is the platform (illustrating). I have my foot on it. Now when I say you didn't see her step off the platform on to the track I mean you never saw her when she had one foot on the platform?
> A. No, Sir.
> Q. No doubt about that?
> A. No, Sir.
> Q. And you say there was something that stopped you from seeing her?
> A. Well, that's why I said I corrected my statement* afterwards. *There was these trucks out there* that I changed my mind about after I had the investigation. I went out, back, and asked them if the trucks were there, and they said, yes. (R. 28-29, emphasis added.)

It is clear, moreover, from his other testimony that *he first saw her immediately after he had passed the trucks and his vision became unblocked.* (See Appendix A, hereto.) At that time he was 180 feet from her, and she was stepping over the rail nearest the platform:

> Q. Can we begin this way? The platform is over here where I am standing. Let us assume that.
> A. Yes.
> Q. Did you see her there?
> A. No, sir.
> Q. All right. Let us assume the first rail is right here. Did you see her before she got to the first rail?

---

* The witness obviously refers to his previous testimony at R. 23. The "statement" he now proceeds to correct (R. 29-30) is the one he made to the railroad people on October 12, 1954, the day after the accident. That statement is Ex. 4 (R. 19-23).

A. Before she got to the first rail?
Q. Yes.
A. I didn't see her until she got her foot over the rail, in the middle of the rails. (R. 31.)

Counsel for the railroad say:

> "... The woman would have taken, at most, one step from the place of safety on the platform to the place of danger on the tracks, and it was while she was taking this step *or a second step* that the engineer first noticed her ..." (Def. Brief 16, emphasis added.)

A *second* step, gentlemen, most certainly a *second* step! For it was 2.5 feet from the edge of the platform to the nearest rail. (Ex. 1A.) This woman who "stepped out slowly" (R. 113) did not at her first step land between the rails. That happened on her second step.

The jury could plainly find the following sequence of events:

Event 1	Engineer's vision of Mrs. Montell blocked by truck on platform.	Mrs. Montell takes first step from platform, placing her foot between platform and nearest rail.
Event 2	Engineer moves up abreast of trucks. His vision of Mrs. Montell no longer blocked.	Mrs. Montell takes second step, moving her foot over the nearest rail and placing it between the rails.

The only remaining question is: How far was the engineer from Mrs. Montell when Events 1 and 2 occurred? We

have shown above that he was *220 feet*, or 11 seconds away when his vision was *blocked*, and *180 feet*, or 9 seconds away, when it became *unblocked*. That showing is summarized on Appendix A, hereto, and is in no way attacked by the railroad. Counsel for the railroad do not now see it for the first time, as it was attached also to our Brief in Opposition to the Petition for Certiorari.

If the engineer first saw Mrs. Montell when he was 9 seconds away, and did nothing for 8 seconds, there can be no question that the jury could find negligence. Quite wisely counsel for the railroad do not attempt to dispute this.

The Opinion of the Court of Appeal

The common sense of the jury perceived the elementary geometry involved here. Quite naturally the jury concluded that an engineer who was approaching a woman in his path at 20 feet per second, and who took no action for 8 seconds, was not careful, whether the woman was a suicide or was merely trying to find an opening in the fence.

Both courts below were so powerfully affected by the word "suicide" that they failed to see the geometry. "Sudden stop caused by appearance of suicide" easily became "sudden stop caused by *sudden* appearance of suicide". It became impossible for either court to understand that the engineer was far more than 40 feet away when the "suicide" appeared. Where's the liability, thinks the trial judge: ". . . perfect case . . . to see nine men treat." (R. 157.) Similarly the Court of Appeal thinks there is only "the faintest scintilla of evidence." (R. 173.) We are now invited by the defendant, in its Point I, to parse and construe the opinion of the Court of Appeal with a view to determining the sufficiency of a "faintest scintilla".

We shall not do so. We are discussing a real case, not

an abstract one; putting forward real evidence, not the emasculated evidence considered by the Court of Appeal. It is now plain to us that one who claps his eye to a telescope and begins to search for scintillas or scintillulas runs some risk of failing to see a body of the first magnitude, visible to the naked eye. We wish to avoid that risk. We need not and do not ask the Court to apply any extreme rule as to the required quantity of evidence; we are content with a rule no stronger than the common-law rule as applied in cases like *Dorr* v. *Lehigh Valley R.R.*, supra. We ask only that the Court judge with *the naked eye* whether such an exacting rule is not abundantly satisfied by the evidence in this record. We ask particularly that the Court carefully examine, and test by the record, Appendix A, hereto attached.

II. No Error Appears in the Disposition of Petitioner's Motion for New Trial.

Petitioner claims its motion for new trial was denied as a matter of law on January 13, 1959. It did not appeal from that order, its only appeal being from the judgment of January 8. (R. 135.) The Court of Appeal held that the disposition of the motion for new trial was not presented by the appeal from the judgment. (R. 174.)

Petitioner argues that an appeal from a judgment always includes within its scope error committed in a post-judgment order denying a new trial. But the matter is not so simple—one must examine the kind of error involved. As a general matter, an order denying a new trial is not appealable or reviewable at all, because it is a matter within the discretion of the trial judge. The rare cases where review may be had fall into two categories:

1. Cases where the denial was an *abuse of discretion.*

2. Cases where the denial involved a *failure to exercise discretion.*

We agree that both types of cases are reviewable. The question is: by what method? Is it the same in both types of cases, as petitioner contends?

In cases involving an abuse of discretion the record will show, on a proper appeal, that the motion was fully heard, and that the trial judge, as a matter of law, arrived at an erroneous conclusion. The appellate court must grant the new trial which the trial judge erroneously denied. The appellate court can do this only by setting aside the judgment. It can set aside the judgment only on an appeal from the judgment. It follows that where the denial of a new trial results from abuse of discretion, the error is reviewable on appeal from the judgment. *DiGiovanni* v. *DiGiovannantonio*, 233 F.(2d) 26, cited by petitioner (Brief, p. 23), is such a case.

A quite different question is presented where the denial of the motion results from a failure to exercise discretion. Here, on a proper appeal, it will not appear that the motion was fully heard. It will not appear that as a matter of law the motion must be granted. All that will appear is that the trial court did not exercise the discretion which it in fact possessed. The appellate court cannot, therefore, grant the motion—all it can do or ought to do is order the trial court to exercise its discretion. It can make such an order without affecting the judgment in any way. There is therefore no need of an appeal from the judgment in this type of case. Furthermore, if an appeal from the judgment is taken, plainly the judgment must be affirmed, unless error of some other kind, not connected with the denial of the motion for new trial, be shown. Since correction of the failure to exercise discretion in no way affects the judgment, the proper appeal in such a case is not from the

judgment but from the order denying the motion. *Magee* v. *General Motors Corp.*, 213 F.2d 899 (3d Cir.). *John E. Smith's Sons Company* v. *Lattimer Foundry and Machine Company*, 239 F.2d 815 (3d Cir.).

There is no doubt that the case at bar, if it involves any error at all, is a case of the second type, where the alleged error consists in a failure to exercise discretion. Petitioner fully agrees:

> "... The issue, therefore, before the Court of Appeals was not one of abuse of discretion, but rather the power of the trial judge to exercise his discretion to set aside the verdict and grant a new trial." (Brief, p. 21.)

We submit, in accordance with the above analysis, that such an error cannot be brought up by an appeal from the judgment. An appeal from the order denying the new trial is necessary.

DiGiovanni v. *DiGiovannantonio*, 233 F.2d 26 (D.C. Cir.) does not help petitioner. That involved an abuse of discretion. The motion for new trial was on the ground of newly discovered evidence. It appeared to the Court of Appeal that the evidence could not have been made available at the trial, and that it had a vital bearing on the issues. The Court of Appeal concluded that the motion ought to have been granted, and did grant it, setting aside the judgment. It held, quite rightly, that an appeal from the judgment was the proper way to carry up that question.

Nor is petitioner aided by *Magee* v. *General Motors Corp.*, 213 F.(2d) 899 (3d Cir.) which it cites at pp. 21-22 of its brief. We agree that in the *Magee* case "the trial judge had denied a motion for a new trial for reasons similar to those given by the trial judge in the case at bar."

(Petitioner's brief, pp. 21-22.) The error involved was a failure to exercise discretion. But the petitioner has overlooked the fact that the appeal in the *Magee* case was not an appeal from the judgment. It was "an appeal by the defendant from the refusal of its motion for a new trial." 213 F.2d 899, 900. This is precisely the appeal the petitioner in this case should have taken, but did not take.

In any case it appears that the trial court did not deny the motion for new trial as a matter of law. The written notation made by the trial judge on the alternative motion (R. 133) was made after the petitioner had waived in open court that part of the motion which asked for a new trial. That written notation therefore applies only to that part of the alternative motion which asked that judgment be entered for petitioner.

At the start of the hearing of January 13, 1959, defendant's counsel cited and discussed *Herdman* v. *Pennsylvania R.R. Co.*, 352 U.S. 518 (R. 155.) That case, he urged, decided that it could not be negligence for an engineer of a train to make a sudden stop when met with an emergency. (R. 155-156.) To this the Court remarked:

> "You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier." (R. 156.)

In making this remark, we submit that the trial judge passed upon and denied grounds 1 and 2 assigned in the motion for new trial. Those grounds are as follows:

> "1. That the verdict is contrary to the evidence and against the weight of the evidence;
> "2. That the verdict is against the law applicable to the evidence . . ." (R. 132.)

That conclusion, we submit, is reinforced by the next succeeding remark of the court made after an interjection by Mr. Deering:

> "The Court: You persuaded the thirteenth juror, but not the twelve." (R. 156.)

Shortly thereafter (R. 157) there occurred the following:

> "Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.
>
> "The Court: This is a perfect case which I would be very happy to see how nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.
>
> "Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that *it is all the stronger case for a Motion for a New Trial because I think it is apparent that the jury in this case disregarded the law* as given by your Honor.
>
> "The Court: *I cannot say that.* I can only say that if this were a case in which a verdict was permissible for the plaintiff, then *I don't think they disregarded my instructions.* I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, *but I am not going to help you much here.* (italics supplied.)

Here, we submit, the judge again ruled that he did not regard the verdict as being against the law as given by him to the jury in his instructions, and again denied the first and second grounds assigned in the motion for new

trial. *He further indicated definitely that he would not grant that motion.* At that point, we respectfully submit, Mr. Deering acquiesced, and ceased to press the motion for new trial on any ground, for he then said to the court:

> "Well, then, perhaps in view of that there is no need for me to continue further." (R. 157.)

All this occurred before the trial judge read the endorsement on the motion. (R. 133.) That endorsement, therefore, in no way relates to the motion for new trial but only to the motion for judgment notwithstanding the verdict.

If we are wrong about the conclusion we have just stated, it is plain that when the ruling was announced the petitioner was bound to call to the trial judge's attention his objection to it. This duty arises under Rule 46 of the Federal Rules of Civil Procedure:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Unquestionably petitioner had an opportunity to object when the ruling was made. If the ruling be interpreted to apply to the motion for new trial, as petitioner desires, it was obviously an inadvertence which would have been corrected at once had it been called to the attention of the court. Since the petitioner failed to do this, the Court

of Appeal was not bound to take notice of the objection when urged for the first time on appeal.

Conclusion

For the reasons above stated it is respectfully submitted that no error appears in the judgment of the Court of Appeal, and that that judgment must be affirmed.

Respectfully submitted,

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Eastern stairway.

Location of witness Brewster at 5th post east of stairway. (Brewster DRA 107 -108).

KIOSK

POSTS

Location of Mrs. Montell as she left platform, per witness Brewster. (DRA 107 -- 109).

ETC.

Position of baggage and ice-trucks per testimony of engineer Crafts (DRA 30, 1.) These obscured his view of Mrs. Montell as she stepped from platform. (Crafts, DRA 17, 28 - 29.)

[redacted]

T. SHELTER

WOOD

GATE

When engineer reached this point he had clear view of Mrs Montell on the track 180 feet away.

Position of engineer when Mrs. Montell stepped off platform.

APPENDIX "A"
(Based on Ex. 1A and testimony of Brewster and Crafts.)
Red line indicates line of sight of engineer at instant Mrs. Montell stepped off platform.

N. Y. N. H. & H. R. R. Co.

BOSTON DIVISION MAIN LINE

PLAN SHOWING PORTION OF TRACK #3 & PLATFORM UNION STATION

PROVIDENCE, RHODE ISLAND

SCALE 1" = 20'

SURVEY BY AEF BK #4 P 17 20

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1960.

New York, New Haven and Hartford Railroad Company, Petitioner, v. Mary L. Donnelly Henagan.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[November 21, 1960.]

Per Curiam.

The respondent was a waitress in the grill car of one of petitioner's trains. She brought this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, for damages for injuries allegedly sustained when an emergency application of the brakes brought the train to a sudden stop. A jury which heard the case in the District Court for the District of Massachusetts returned a verdict for respondent. The trial judge denied the petitioner's motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeals for the First Circuit affirmed, 272 F. 2d 153. We granted certiorari, 362 U. S. 967.

The train was pulling into petitioner's station at Providence, Rhode Island, for a scheduled stop. One Montell, apparently to commit suicide, stepped on the track from the station platform as the train approached alongside the platform. The engineer made the emergency application of the brakes in an unsuccessful effort to stop the train before it reached Montell. We have examined the trial record and hold that the proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the respondent's injury. See *Herdman* v. *Pennsylvania R. Co.*, 352 U. S. 518.

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The judgment of the Court of Appeals is reversed and the cause remanded to the District Court with direction to enter judgment for the petitioner notwithstanding the verdict.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. They believe there was evidence of negligence sufficient for the jury, as summarized by Judge Woodbury, speaking for a unanimous Court of Appeals. 272 F. 2d 153. They also dissent from the direction to enter judgment for the defendant, since they are of the view that if there is a reversal, there should be a new trial. *See Galloway* v. *United States*, 319 U. S. 372, 396 (dissenting opinion).

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari was improvidently granted.